Supreme Court, U.S.
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80-328

No.

In The

Supreme Court of the United States

THE PEOPLE OF THE STATE OF NEW YORK,
Petitioner,

against

ROGER BELTON,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

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Question Presented

Did the New York Court of Appeals improperly conclude, contrary to well-established principles of law, that the jacket in the instant case was in the exclusive custody of the police, and therefore was not searched incidentally to a lawful arrest?

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PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The Petitioner respectfully prays for a writ of certiorari to review the judgment and decree of the New York Court of Appeals in the case of People of the State of New York vs. Roger Belton. The judgment was entered on June 5, 1980.

Opinions and Orders Below

The opinion of the New York Court of Appeals is reported at 50 N.Y.2d 447 and appears in the Appendix hereto at A-2. The opinion of the New York Supreme Court, Appellate Division, Fourth Judicial Department is reported at 68 App. Div. 2d 198 and appears in the Appendix hereto at A-14.

Jurisdiction

Jurisdiction of this Court is invoked pursuant to Title 28, U.S.C. §1257(3). The judgment of the New York Court of Appeals was entered on June 5, 1980, reversing the affirmance of respondent's conviction by the New York Supreme Court, Appellate Division, Fourth Judicial Department.

STATEMENT

A. *Procedural History*

The defendant in this proceeding, and the respondent herein, Roger Belton, was indicted by the Ontario County, New York Grand Jury on a charge of criminal possession of a controlled substance in the fifth degree, a felony under section 220.09 of the New York Penal Law. Thereafter, the respondent moved for various forms of relief, including the suppression of the fruits of the search of the respondent's jacket as obtained in violation of his right to be free from unreasonable searches and seizures under the Fourth and Fourteenth Amendments to the United States Constitution. The motion was denied after a suppression hearing held pursuant to New York Criminal Procedure Law §710.60(4). The respondent subsequently pleaded guilty to a charge of attempted criminal possession of a controlled substance in the sixth degree, a felony under New York Penal Law §§220.06 and 110.00.

At the time of sentence, execution thereof was stayed by the Ontario County Court pending appeal, pursuant to New York Criminal Procedure Law §460.50, and the respondent's release on bail was continued. After granting an extension of time to perfect the appeal, the New York Supreme Court, Appellate Division, Fourth Judicial Department unanimously affirmed the conviction in a written opinion.

Further, permissive appeal was granted by the Hon. Matthew J. Jasen, Associate Judge of the New York Court of Appeals. After granting a motion for an extension of time to perfect the

appeal, the New York Court of Appeals reversed the lower court's affirmance of the conviction, and in a written opinion dismissed the indictment by a 5-2 vote.

B. *Factual Background*

There is little dispute as to the facts of the case. The respondent and three male companions were riding in an automobile being driven along the New York State Thurway when the car was stopped by State Trooper Nicot for speeding. Upon approaching the stopped vehicle, the Trooper smelled the odor of burning marihuana emanating from within the car through the driver's window. Noticing an envelope on the floor of the car commonly used for containing marihuana, the Trooper asked all four occupants to step out of the car, and, after patting each one down as he left the car arrested the four for unlawful possession of the marihuana. Having only one set of handcuffs, the officer did not place them on any of the four arrestees.

The Trooper then looked into the automobile and retrieved the envelope, which was stamped "Supergold," and found it to contain what appeared to be marihuana. He also observed what appeared to be partially burned marihuana cigarettes in the car's ashtrays.

Turning his attention to the vehicle's back seat, the officer found five jackets in the middle of the seat. In checking the pockets of each jacket, he discovered a quantity of what was determined to be cocaine and a medical insurance card in the name of the respondent in one of the jackets. As a result of the search, all four of the car's occupants, who were standing unsecured around the car, were placed under arrest for possession of the cocaine.

The Ontario County Grand Jury returned an indictment against the respondent for unlawful possession of cocaine, while directing that no charges be filed against his three companions. Prior to pleading guilty, the respondent challenged the search of

the car at a suppression hearing, his contention being that the search did not fall within any of the exceptions to the Fourth Amendment's warrant requirement. The People's theory was that the search was incidental to a lawful arrest, one of the established situations wherein a search warrant is not a requirement.

The trial court agreed that the search was permissible as incident to arrest, and the intermediate level appeals court unanimously affirmed. However, a divided New York Court of Appeals, patently misconstruing and unrealistically applying the purposes and parameters of the search incident exception, reversed the lower court's affirmance. It is this erroneous interpretation of a fundamental legal doctrine, clearly out of step with the application of this doctrine by other state and federal courts, that we urge should be reversed.

REASONS FOR GRANTING THE WRIT

1. The decision of the New York Court of Appeals conflicts with established interpretations of the search incident to arrest doctrine and with the decision of other state courts of last resort and of federal Courts of Appeals.

The court of trial jurisdiction in this case, Ontario County Court, New York, denied the respondent's motion to suppress the fruits of a search of the car in which he was riding. The court's ruling was predicated on the conclusion, after a hearing, that the respondent's jacket in the car had not been reduced to the exclusive control of the police officer at the time of the search, and that the search was proper as incident to a lawful arrest. The New York Court of Appeals, by a divided vote, reversed the intermediate level appellate court's unanimous affirmance of this ruling, holding that the jacket was within the exclusive control of the police officer, and that the search was therefore not permissible.

We urge that this conclusion by the New York Court of Appeals was patently erroneous under the United States Supreme Court's decision in *Chimel v. California*, 395 U.S. 752 (1969), and in complete disharmony with the decisions of federal Courts of Appeals and state courts of last resort that have been confronted by similar factual situations. Because of the patent conflict between the New York State judiciary's approach to searches contended to be incidental to lawful arrests, and the approach of virtually all other state and federal appeals courts, it has become extremely difficult to intelligently advise law enforcement officers as to the lawful limits of their actions when confronted with factual situations similar to that in the present case. This case is appropriate for this Court's consideration of the principles contained herein, under well-accepted guidelines of long standing. Conflicts on federal questions between decisions of federal Courts of Appeals and of the highest state courts have been held to justify Supreme Court review. See e.g., *Katzinger Co. v. Chicago Metallic Mfg. Co.*, 329 U.S. 394, 398 (1947). Similarly, conflicting interpretations of federal questions by the highest courts of two or more states have likewise been held to warrant the Supreme Court's acceptance of such cases for review. See, e.g., *United States v. Oregon*, 366 U.S. 643, 645 (1961). Consequently, we ask this Court to exercise its discretionary power to hear this case.

Any examination of the legality of the conduct of the police officer in this case, New York State Trooper Nicot, must begin with a reference to *Chimel v. California, supra*, wherein the Supreme Court stated that when an arrest is made, it is reasonable for the arresting officer to search, for weapons or destructable evidence, the person arrested and the area " 'within his immediate control' — construing that phrase to mean the area from which he might gain possession of a weapon or destructable evidence." 395 U.S. at 763. "The authority to search the person incident to a lawful custodial arrest . . . does not

depend upon what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect." *United States v. Robinson*, 414 U.S. 218, 235 (1973).

The Supreme Court expounded upon the concept of "immediate control" in *United States v. Chadwick*, 433 U.S. 1 (1977), stating that "(o)nce law enforcement officers have reduced luggage or other personal property not immediately associated with the person of the arrestee to their exclusive control, and there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer an incident of the arrest." 433 U.S. at 15. It is against these principles that Trooper Nicot's actions must be measured.

Obviously, the critical factor in this case is whether the respondent's jacket, searched by Trooper Nicot at the scene of the arrest, was within the "immediate" or "exclusive" control of the Trooper at the time of the search. It is the People's position that the jacket had not come within Trooper Nicot's exclusive control, but rather that, as noted in the dissenting opinion in the New York Court of Appeals, "(t)he situation was still fluid." *New York v. Belton*, 50 N.Y. 2d 447, 454 (1980) (Gabrielli, J., dissenting). The Trooper had made an arrest of the four occupants of a speeding car based on probable cause, and having only one pair of handcuffs, he lacked the capability to secure the four. The defendants were all outside standing at various points around the car. It would have been eminently possible and plausible for one or more of the four to lunge inside the car to grab a weapon or destroy evidence. This is the classic situation envisioned in the *Chimel* decision and its progeny in which a search of the car and its contents would be completely justified. In fact, a review of federal and state court decisions concerning cases with similar fact patterns reveals no authority for reversing the present conviction.

For example, among the federal courts, warrantless searches were upheld as incident to arrest in the following cases. A search of a jacket on the front seat of a car was proper where two suspects were outside the car and one was seated in the car, amid five police officers in *United States v. Wilkerson*, 598 F. 2d 621 (D.C. Cir., 1978). The seizure of contraband on the floor of a car which a defendant had just left or was in the process of leaving was held proper in *United States v. Agostino*, 608 F. 2d 1035 (5th Cir., 1979). In another case, a police officer grabbed a bag from between the seats of a car which was surrounded by four males smoking marihuana. The search was held proper. *United States v. Foster*, 584 F. 2d 997 (D.C. Cir., 1978). Many other decisions are also probative of this issue, such as *United States v. Campbell*, 575 F. 2d 505 (5th Cir., 1978); *United States v. Garcia*, 605 F. 2d 349 (7th Cir., 1979); and *United States v. Ajloujny*, 476 F. Supp. 995 (E.D. N.Y., 1979). Those cases *rejecting* search incident arguments generally find that the object searched was within the exclusive control of the arresting officers where the defendant is outnumbered by police and handcuffed. See, e.g., *United States v. Neumann*, 585 F. 2d 355 (8th Cir., 1978) and *United States v. Schleis*, 582 F. 2d 1166 (8th Cir., 1978).

State courts have also generally applied the principles relative to searches incident to arrest uniformly and in a fashion that would sustain the search in the present case. For example, in two separate cases a search of a car was upheld as incident to arrest where each arrestee was near the car, with his hands placed on the car's roof. *North Carolina v. Hunter*, 261 S.E. 2d 189 (1980); *Louisiana v. Wilkens*, 364 So. 2d 934 (1978). And again, searches of cars and their contents have generally been ruled impermissible when the arrestee is handcuffed or otherwise well secured by a greater number of police. See, e.g., *Louisiana v. Blanchard*, 374 So. 2d 1248 (1979); *Montana v. Cripps*, 582 P. 2d 312 (1978).

A review of the facts of this case, particularly in light of the manner in which other jurisdictions have approached and decided questions such as this, must lead to the inescapable conclusion that State Trooper Nicot acted in an entirely appropriate fashion, considering the circumstances. He could not immobilize all four defendants. Assistance had not yet arrived at the scene. He had the right and duty to make certain that his safety wasn't threatened by the four men whom he had just arrested, and that any evidence secreted in the defendant's car was not destroyed. The fact that the New York Court of Appeals has held otherwise causes acute difficulties in advising police officers as to the limit of their legal authority under such circumstances. We prefer to believe that a more considered approach to this case, in light of established constitutional principles, would yield the conclusion that the search was necessary and proper. As the dissenting opinion in the decision below stated: "Apparently the majority believes that since the suspects were standing outside the car at the time of the search and had been told that they were under arrest, both their persons and their property had thereby been conclusively and safely reduced to the complete control of the officer, as a matter of law. Although one might well wish that all criminal suspects could so readily be subdued as a matter of law, I cannot agree with a decision that requires a police officer to stake his life upon the validity of such a questionable presumption." *New York v. Belton, supra,* at 454, 455. (Gabrielli, J., dissenting). The dissent was from a decision in complete disharmony, in its interpretation of an important Constitutional doctrine, with that of New York's sister states and of the federal courts.

CONCLUSION

For the foregoing reasons, we respectfully ask that a writ of certiorari issue to review the judgment and decision of the New York Court of Appeals.

Respectfully submitted,

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APPENDIX

ORDER OF THE NEW YORK COURT OF APPEALS

Remittitur

COURT OF APPEALS
STATE OF NEW YORK
The Hon. Lawrence H. Cooke, Chief Judge, Presiding

4 No. 208

The People &c.,

Respondent,

v.

Roger Belton,

Appellant.

The appellant in the above entitled appeal appeared by Lipsitz, Green, Fahringer, Roll, Schuller & James; *the respondent appeared by* James R. Harvey.

The Court, after due deliberation, orders and adjudges that the order is reversed, motion to suppress granted and indictment dismissed. Opinion by Cooke, Ch.J. All concur except Gabrielli, J., who dissents and votes to affirm in an opinion in which Jasen, J., concurs.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the County Court, Ontario County, *there to be proceeded upon according to law.*

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

/s/ JOSEPH W. BELLACOSA
Joseph W. Bellacosa, Clerk of the Court

Court of Appeals, Clerk's Office, Albany, June 5, 1980.

OPINION OF THE NEW YORK COURT OF APPEALS

The People of the State of New York, Respondent, v Roger Belton, Appellant.

Argued April 21, 1980; decided June 5, 1980

SUMMARY

Appeal, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department, entered May 22, 1979, which affirmed a judgment of the Ontario County Court (Harold Stiles, J.), convicting defendant, upon his plea of guilty, of attempted criminal possession of a controlled substance in the sixth degree.

On April 9, 1978, defendant and three companions were traveling on the New York State Thruway in Ontario County when their car was stopped by a State trooper for speeding. Upon approaching the vehicle, the officer smelled the distinct odor of marihuana emanating from within and observed on the floor an envelope which he recognized as a type that is commonly used to sell the substance. At that point, the officer ordered the occupants out of the vehicle, patted each down, removed the envelope from the floor and ascertained that it contained a small amount of marihuana. After the marihuana was found, the individuals, still standing outside the car, were placed under arrest. The officer then re-entered the vehicle, searched the passenger compartment and seized the marihuana cigarette butts lying in the ashtrays. He also rifled through the pockets of five jackets on the back seat. Upon opening the zippered pocket of one of them, he discovered a small amount of cocaine and defendant's identification. Following denial of his motion to suppress the cocaine, defendant pleaded guilty to attempted possession of a criminal substance in the sixth degree. A unanimous Appellate Division affirmed, holding that the warrantless search of the jacket was lawful as incident to defendant's arrest for possession of marihuana.

Opinion of the New York Court of Appeals

The Court of Appeals reversed, granted the motion to suppress and dismissed the indictment, holding, in an opinion by Chief Judge Cooke, that, following a lawful arrest, the privacy interest of the arrestee in an article remains intact once he is effectively neutralized or the article is within the exclusive control of the police, at which point any exigency which would otherwise have justified a warrantless search has been dissipated and the search is no longer incident to the arrest.

HEADNOTE

Crimes — Unlawful Search and Seizure

A custodial arrest of a suspect based upon probable cause without a warrant in a public place constitutes a reasonable intrusion on the individual's right to privacy under the Fourth Amendment to the United States Constitution and, that arrest being a lawful and substantial intrusion, any search incident thereto requires no additional justification; moreover, since there is always present the danger that the arrestee may seek to use a weapon to effect an escape or destroy or conceal evidence of a crime, to safeguard himself and others, and to prevent the loss of critical evidence, it is reasonable from a Fourth Amendment perspective for the arresting officer to conduct a prompt, warrantless search of the arrestee's person and the area within his immediate control, i.e., the area from within which he might gain possession of a weapon or destructible evidence. However, a warrantless search of the zippered pockets of a jacket found in the back seat of the car in which defendant was traveling when he was stopped by police, ordered to leave the car and arrested on probable cause, may not be upheld as a search incident to a lawful arrest where there was no longer any danger that the arrestee or a confederate might gain access to the article at the time of the search; the critical inquiry focuses upon the extent to which the arrestee may gain access to the property rather than the time or space between the arrest and the search.

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES*

68 Am Jur 2d, Searches and Seizures §§92, 93, 96, 102

8 Am Jur Pl & Pr Forms (Rev), Criminal Procedure, Form 176; 22 Am Jur Pl & Pr Forms (Rev), Searches and Seizures, Forms 85-88

13 Am Jur Proof of Facts 391, Criminal Drug Addiction and Possession

5 Am Jur Trials 331, Excluding Illegally Obtained Evidence; 8 Am Jur Trials 573, Defense of Narcotics Cases

*By the Publisher's Editorial Staff.

POINTS OF COUNSEL

Paul J. Cambria, Jr., and *Barbara Davies Eberl* for appellant. The warrantless search of appellant's zippered jacket in the absence of exigent circumstances while it was within the exclusive control of the police, and the seizure of contraband from its recesses violates the Fourth and Fourteenth Amendments and requires that the evidence be suppressed and the indictment dismissed. *(Arkansas v Sanders*, 442 US 753; *United States v Chadwick*, 433 US 1; *Coolidge v New Hampshire*, 403 US 443; *People v De Santis*, 46 NY2d 82; *People v Perel*, 34 NY2d 462; *People v Cofield*, 55 AD2d 113, 43 NY2d 654; *United States v Johnson*, 588 F2d 147; *United States v Schleis*, 582 F2d 1166; *Chimel v California*, 395 US 752; *United States v Stevie*, 582 F2d 1175.)

James R. Harvey, District Attorney (R. Michael Tantillo of counsel), for respondent. The warrantless search of the vehicle and of appellant's jacket therein was not violative of the Fourth and Fourteenth Amendments in that the search was properly incident to a lawful arrest. *(Chimel v California*, 395 US 752; *United States v Robinson*, 414 US 218; *People v Weintraub*, 35

NY2d 351; *People v De Santis*, 46 NY2d 82; *United States v Chadwick*, 433 US 1; *United States v Garcia*, 605 F2d 349; *People v Cofield*, 55 AD2d 113, 43 NY2d 654; *Arkansas v Sanders*, 442 US 753; *Chambers v Maroney*, 399 US 42; *Carroll v United States*, 267 US 132.)

OPINION OF THE COURT

Chief Judge Cooke.

A warrantless search of the zippered pockets of an unaccessible jacket may not be upheld as a search incident to a lawful arrest where there is no longer any danger that the arrestee or a confederate might gain access to the article.

On April 9, 1978, defendant and three companions were traveling on the New York State Thruway in Ontario County when their car was stopped by a State trooper for speeding. Upon approaching the vehicle, the officer smelled the distinct odor of marihuana emanating from within and observed on the floor an envelope which he recognized as a type that is commonly used to sell the substance. At that point the officer ordered the occupants out of the vehicle, patted each down, removed the envelope from the floor and ascertained that it contained a small amount of marihuana.

After the marihuana was found, the individuals, still standing outside the car, were placed under arrest. The officer then reentered the vehicle, searched the passenger compartment and seized the marihuana cigarette butts lying in the ashtrays. He also rifled through the pockets of five jackets on the back seat. Upon opening the zippered pocket of one of them, he discovered a small amount of cocaine and defendant's identification.

Following denial of his motion to suppress the cocaine, defendant pleaded guilty to attempted possession of a criminal substance in the sixth degree. A unanimous Appellate Division

affirmed, holding the warrantless search of the jacket lawful as incident to defendant's arrest for possession of marihuana (68 AD2d 198). There should be a reversal.

Analysis begins with the general proposition that, except in a few narrowly circumscribed instances, the Fourth Amendment condemns warrantless searches and seizures as unreasonable *(Coolidge v New Hampshire,* 403 US 443, 455). The privacy interest of our citizens is far too cherished a right to be entrusted to the discretion of the officer in the field. Reasonableness of the intrusion does not turn upon the belief, however well founded it may be, that the article sought is concealed in a particular place. The Constitution, therefore, focuses upon the desirability of having the judiciary, rather than the police, determine when searches and seizures are permissible and the limitations that are to be placed upon such activities. Necessarily, then, the predicate for the warrantless search must be carefully examined to ensure that its scope, both temporally and geographically, did not exceed constitutional limits.

The People maintain that the warrantless search of defendant's jacket was reasonable on the ground that it was incident to his lawful arrest. A custodial arrest of a suspect based upon probable cause without a warrant in a public place constitutes a reasonable intrusion under the Fourth Amendment *(United States v Watson,* 423 US 411). That arrest being a lawful and substantial intrusion, any search incident thereto requires no additional justification *(People v Perel,* 34 NY2d 462; see, also, *People v Weintraub,* 35 NY2d 351).

When a suspect is placed under custodial arrest, there is always present the danger that he may seek to use a weapon to effect an escape or destroy or conceal evidence of a crime. Thus, to safeguard himself and others, and to prevent the loss of critical evidence, it is reasonable from a Fourth Amendment perspective for the arresting officer to conduct a prompt,

warrantless "search of the arrestee's person and the area 'within his immediate control' — construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence" *(Chimel v California,* 395 US 752, 763). Upon arrest, the privacy interest of the arrestee in possessions within the arrestee's immediate control are subsumed within the State's interest in discovering weapons, thwarting access to means of escape and preventing the destruction of evidence (see *United States v Robinson,* 414 US 218). But while the arrest establishes the authority for the warrantless search, it does not transform the initial predicate into carte blanche justification to rummage through all articles which might bear some connection to the arrestee (see *Dyke v Taylor Implement Co.,* 391 US 216; People v Williams, 37 NY2d 206; *People v Lewis,* 26 NY2d 547).

The privacy interest of the arrestee in an object remains intact once he is effectively neutralized or the object is within the exclusive control of the police (see *Arkansas v Sanders,* 442 US 753; *United States v Chadwick,* 433 US 1). At that point, any exigency which would otherwise have justified a warrantless search has been dissipated and the search is no longer an incident to the arrest (but cf. *People v De Santis,* 46 NY2d 82; *People v Darden,* 34 NY2d 177).[1] The critical inquiry focuses upon the extent to which the arrestee may gain access to the property rather than the time or space between the arrest and search (see *United States v Edwards,* 415 US 800).

In this regard, *United States v Chadwick* (433 US 1, *supra*) is instructive. There, railroad officials in San Diego observed two individuals loading a heavy footlocker onto a train bound for Boston. Their suspicions were aroused when the trunk leaked talcum powder, a substance commonly used to mask the odor of

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[1]To the extent that these cases may be read to suggest otherwise, they are disapproved.

marihuana. The officials notified Federal agents who relayed the information to their counterparts in Boston. When the train arrived in that city, the two individuals who had loaded the footlocker in San Diego were on hand and lifted it into the trunk of Chadwick's waiting car. At that point, Federal agents arrested all three, seized the footlocker and transported them to the Federal building. There, with the arrestees safely incarcerated, the agents opened the trunk and seized a large quantity of marihuana. In holding the search unlawful, the court rejected the notion that it was incidental to Chadwick's arrest. Said the Court: "Once law enforcement officers have reduced luggage or other personal property not immediately associated with the person of the arrestee to their exclusive control, and there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer an incident of the arrest" (433 US, at p 15; see, also, *Arkansas v Sanders*, 442 US 753, *supra*).

That defendant retained an expectation of privacy in the contents of his jacket pockets notwithstanding the fact of his arrest is beyond dispute. Indeed, it is difficult to imagine a more private receptacle where one might place one's most personal items than the zippered recesses of a jacket. Defendant's arrest, standing alone, did not vitiate that privacy interest by being converted into a license for law enforcement authorities to engage in a warrantless search of unlimited temporal and geographic scope. Once defendant had been removed from the automobile and placed under arrest, a search of the interiors of a private receptacle safely within the exclusive custody and control of the police may not be upheld as incident to his arrest (*United States v Chadwick*, 433 US 1, *supra*; *Arkansas v Sanders*, 442 US 753, *supra*). The car was in a secure place where it could have been easily guarded, its occupants under arrest and safely away from the vehicle, their removal to the police station im-

minent.[2] There was, therefore, no reason why the search should not have awaited the issuance of a warrant.

Accordingly, the order of the Appellate Division should be reversed, the motion to suppress granted and the indictment dismissed.

Gabrielli, J. (dissenting). I respectfully dissent. Although I am in agreement with the standard legal principles enunciated by the majority, I cannot concur in what appears to be an obvious misapplication of those principles to the facts of this case.

A warrantless search based on probable cause is permissible if the facts underlying the search bring it within any of several narrow exceptions to the warrant requirement with which this court is fully familiar. One such exception to the warrant requirement is a search incident to a lawful arrest. Although this particular exception has had a somewhat uncertain history (compare *Trupiano v United States*, 334 US 699, with *United States v Rabinowitz*, 339 US 56), it is now well settled and cannot be disputed that a police officer making a valid arrest may legitimately engage in a limited search of both the person of the arrestee and "the area from within which he might gain possession of a weapon or destructible evidence" (*Chimel v California*, 395 US 752, 763) without first obtaining a search warrant. Moreover, although the general rationale for permitting warrantless searches under certain circumstances is the need to allow a police officer sufficient flexibility to protect

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[2]One searches the record in vain for support of the dissenter's claim that at the time of arrest—the point from which the predicate for the warrantless search is measured—"the jackets were within reach of the four suspects and had not yet been reduced to the exclusive control of the officer" (dissenting opn, p 454). Indeed, the facts, as found at the suppression hearing and affirmed by the Appellate Division, were to the effect that the jacket was searched after the defendant was removed from the vehicle and then placed under arrest.

himself from possible danger and to prevent the destruction of evidence (see, generally, *Arkansas v Sanders*, 442 US 753, 759), a warrantless search incident to a lawful arrest may be made "whether or not there is probable cause to believe that the person arrested may have a weapon or is about to destroy evidence" *(United States v Chadwick*, 433 US 1, 14).

To be sure, such a search is subject, as it should be, to careful judiciary scrutiny before its fruits may be admitted into evidence. As the Supreme Court has recently stated, "warrantless searches of luggage or other property seized at the time of an arrest cannot be justified as incident to that arrest either if the 'search is remote in time or place from the arrest' * * * or no exigency exists. Once law enforcement officers have reduced luggage or other personal property not immediately associated with the person of the arrestee to their exclusive control, and there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer an incident of the arrest" *(United States v Chadwick, supra*, at p 15). While these principles are readily articulated, their application to individual cases may seem, at first blush, to be a task of some complexity. This is so in large part because each case must turn upon its peculiar facts and "an apparently small difference in the factual situation frequently is viewed as a controlling difference in determining Fourth Amendment rights" *(Arkansas v Sanders*, 442 US 753, 757, *supra)*. This observation is particularly apt when applied to a case such as this, in which all members of the court are agreed that the validity of the challenged search turns upon the degree to which the defendant and his property had come within the exclusive control of the police at the time of the search. Clearly, we are here presented with a valid arrest based upon probable cause. This is, as it must be, conceded by all. Moreover, there exists no dispute but that the officer's search of the persons of the defendant and his companions and the initial

search of the car for contraband were entirely proper. The only issue that divides this court, then, is whether the officer acted illegally by extending his search to include the pockets of the jackets thrown on the back seat of the automobile. The courts below, which by law, unlike this court, are empowered to resolve disputes of fact, have concluded that the jackets were within reach of the four suspects and had not yet been reduced to the exclusive control of the officer. I find no justification for disturbing this essentially factual determination and, based upon this finding, the conclusion that the search was incidental to a lawful arrest cannot be avoided.

Certainly there exists sufficient evidence in the record before us to support the factual findings made by the courts below. Indeed, this case is illustrative of the type of situation in which a warrantless search is most appropriate. We are not here faced with an extended search of a defendant's property after the defendant has been completely subdued and all actual danger has passed. Rather, this search was conducted by a lone peace officer who was in the process of arresting four unknown individuals whom he had stopped in a speeding car owned by none of them and apparently containing an uncertain quantity of a controlled substance. The suspects were standing by the side of the car as the officer gave it a quick check to confirm his suspicions before attempting to transport them to police headquarters or radioing for assistance. The situation was still fluid, and neither the suspects themselves nor their property had as yet been reduced to the exclusive and certain control of the police. I cannot agree that under these circumstances the officer acted improperly in searching the jackets found on the back seat of the automobile. The potential for danger to the officer or for the destruction of evidence is patent, and thus the search must be deemed incidental to the arrest.

I must confess that I am somewhat puzzled by the rationale adopted by the majority of this court today, for it appears rather

ingenuous. Instead of undertaking that careful factual analysis of the realities underlying the continuing encounter between the lone officer and the four suspects which is so necessary to fairly judge the reasonableness of the officer's actions, the court premises its decision completely upon an uncertain assumption drawn from two isolated facts. Apparently the majority believes that since the suspects were standing outside the car at the time of the search and had been told that they were under arrest, both their persons and their property had thereby been conclusively and safely reduced to the complete control of the officer, as a matter of law. Although one might well wish that all criminal suspects could so readily be subdued as a matter of law, I cannot agree with a decision that requires a police officer to stake his very life upon the validity of such a questionable presumption.

Accordingly, I vote to affirm the order appealed from.

Judges Jones, Wachtler, Fuchsberg and Meyer concur with Chief Judge Cooke; Judge Gabrielli dissents and votes to affirm in a separate opinion in which Judge Jasen concurs.

Order reversed, etc.

ORDER OF THE NEW YORK SUPREME COURT, APPELLATE DIVISION, FOURTH DEPARTMENT

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

PRESENT: DILLON, P.J., CARDAMONE, SCHNEPP, DOERR, MOULE, JJ.

People of the State of New York,

Respondent,

vs.

Roger Belton,

Appellant.

The above named Roger Belton, defendant in this action, having appealed to this Court from a judgment of the Ontario County Court, entered in the Ontario County Clerk's office on September 29, 1978 and said appeal having been argued by Paul Cambria of counsel for appellant, Timothy Buckley of counsel for respondent, and due deliberation having been had thereon,

It is hereby ORDERED, That the judgment so appealed from be, and the same hereby is unanimously affirmed.

Opinion by Moule, J., which is hereby made a part hereof.

Entered: May 22, 1979

MARY F. ZOLLER, *Clerk*

OPINION OF THE NEW YORK SUPREME COURT, APPELLATE DIVISION, FOURTH DEPARTMENT

The People of the State of New York, Respondent, v Roger Belton, Appellant.

Fourth Department, May 22, 1979

SUMMARY

Appeal from a judgment of the Ontario County Court (Harold Stiles, J.), rendered September 29, 1978, convicting defendant, upon his plea of guilty, of attempted criminal possession of a controlled substance in the sixth degree.

HEADNOTE

Crimes — Unlawful Search and Seizure — Warrantless Search Incident to Arrest

It was not error for the trial court to fail to suppress cocaine found in defendant's jacket which was searched without a warrant in the rear seat of an automobile from which defendant had exited in order to be arrested for possession of marihuana after the car in which defendant was traveling was observed traveling 75 miles per hour and the arresting officer smelled the odor of marihuana coming from within the automobile and observed an envelope on the floor of the automobile of a type commonly used to sell marihuana, since the search was incident to arrest; upon a lawful arrest, a search may be made of the person of the arrestee and of the area within the arrestee's control, which area includes those personal effects of the arrestee that are "ready to hand".

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES*

68 Am Jur 2d, Searches and Seizures §§36, 96
22 Am Jur Pl & Pr Forms (Rev), Searches and Seizures, Forms 71 et seq.

ANNOTATION REFERENCE

Modern status of rule as to validity of nonconsensual search and seizure made without warrant after lawful arrest as affected by lapse of time between, or difference in places of, arrest and search. 19 ALR3d 727.

*By the Publisher's Editorial Staff.

APPEARANCES OF COUNSEL

Lipsitz, Green, Fahringer, Roll, Schuller & James (Paul J. Cambria, Jr., of counsel), for appellant.

James R. Harvey, District Attorney (Timothy Buckley of counsel), for respondent.

OPINION OF THE COURT

On this appeal defendant contends that the trial court erred in denying his motion to suppress cocaine found in his jacket which was searched without a warrant in the rear seat of an automobile from which defendant had exited in order to be arrested for possession of marihuana. On April 9, 1978 a State Police officer observed an automobile with four passengers traveling 75 miles per hour on the New York State Thruway. Upon stopping the auto and questioning the driver, the officer smelled the odor of marihuana coming from within the auto and observed on the floor of the auto an envelope stamped "Supergold" which he recognized as a type of envelope that is

commonly used to sell marihuana. The officer ordered the occupants from the auto and patted each down. He then removed the "Supergold" envelope from the auto and, when he found that it contained traces of marihuana, he arrested the four for possession of marihuana, read them their rights and searched them. The officer then searched the passenger compartment of the auto and seized marihuana cigarette butts which he observed in the ashtrays. He also searched five jackets that he found in the back seat and, in one of them, he found cocaine and defendant's identification. The officer then arrested the four for possession of cocaine.

On May 24, 1978 the Ontario County Grand Jury indicted defendant for criminal possession of a controlled substance in the fifth degree. Defendant pleaded guilty to attempted possession of a criminal substance in the sixth degree following the Ontario County Court's denial of his motion to suppress the cocaine.

Defendant contends that the warrantless search of his jacket violated his constitutional rights. The cornerstone of any Fourth Amendment inquiry is reasonableness and a warrantless search must come within one of the "specifically established and well-delineated exceptions" to the warrant requirement *(Katz v United States,* 389 US 347, 357). The exceptions are (1) a consensual search; (2) seizure of evidence and contraband in plain view; (3) search and seizure incidental to a lawful arrest; (4) search and seizure based upon probable cause, and, applicable to automobile searches; (5) a search in exigent circumstances where there exists probable cause *(People v Mahoney,* 60 AD2d 107, 109-110). Inasmuch as defendant does not challenge the lawfulness of either the initial stop or the arrest for possession of marihuana, the narrow question on this appeal is whether the search of defendant's jacket in the back seat of the vehicle can be justified under one of the above exceptions.

Opinion of the New York Supreme Court, Appellate Division, Fourth Department

The People contend that the search was justified as a search incident to arrest and we agree. Upon a lawful arrest, a search may be made of the person of the arrestee and of the area within the arrestee's control *(United States v Robinson,* 414 US 218, 224; *Chimel v California,* 395 US 752, 763). This area includes those personal effects of the arrestee that are "ready to hand" *(People v Weintraub,* 35 NY2d 351, 354). Warrantless searches incident to arrest are justified by the officer's need to find weapons and easily destructible evidence within the arrestee's immediate area *(United States v Robinson, supra; Chimel v California, supra).* Such searches are also allowed so that an officer can discover the fruits of the crime, the instrumentalities used to commit the crime and contraband *(People v Lewis,* 26 NY2d 547, 550-551).

Defendant contends that *United States v Chadwick* (433 US 1) mandates suppression of the cocaine. In that case the United States Supreme Court held unreasonable as a search incident to arrest the search of a footlocker seized from an automobile upon the defendant's arrest and searched one and one-half hours later at a police station. In *People v De Santis* (46 NY2d 82) the Court of Appeals interpreted *Chadwick* narrowly and allowed, as a search incident to arrest, the search of a suitcase in defendant's possession at the time of arrest. The court found the search reasonable because it had a close nexus to the time and place of the arrest *(People v De Santis, supra).* The court noted that "the practical impetus for allowing these searches lies in the fact that the arrest itself constitutes such a major intrusion into the privacy of the individual that the encroachment caused by a contemporaneous search of the arrestee and his possessions at hand is in reality *de minimis" (People v De Santis, supra,* p 87, citing *People v Perel,* 34 NY2d 462, 467-468; see, also, *United States v Ochs,* 595 F2d 1247).

Opinion of the New York Supreme Court, Appellate Division, Fourth Department

In *People v Cofield* (55 AD2d 113, affd 43 NY2d 654), the First Department found reasonable as a search incident to arrest the search of a paper bag within a satchel on the back seat of defendant's auto while defendant stood outside the auto. Also, in *People v Abramowitz* (58 AD2d 921), the Third Department allowed as a search incident to arrest the search of a leather bag behind the driver's seat of a vehicle after the driver had been arrested for driving while impaired and after pills were found during a search of his person (see, also, *People v Sauger*, 58 AD2d 919; *People v Mangan*, 55 AD2d 247, 249).

The officer's search of defendant's jacket which he found in the vehicle did not exceed constitutional limits. The search was reasonable in scope, intensity and duration. Once defendant was validly arrested for possession of marihuana, the officer was justified in searching the immediate area for other contraband.

The judgment should be affirmed.

Dillon, P.J., Cardamone, Schnepp and Doerr, JJ., concur.

Judgment unanimously affirmed.

No. 80-328

In The

Supreme Court of the United States

OCTOBER TERM, 1980

THE PEOPLE OF THE STATE OF NEW YORK,

v.

ROGER BELTON,

Respondent.

On Writ Of Certiorari To The Court Of Appeals Of New York

JOINT APPENDIX

JAMES R. HARVEY
District Attorney,
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Counsel for Respondent

Petition for Certiorari Filed September 2, 1980
Certiorari Granted January 19, 1981

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CHRONOLOGICAL LIST OF
RELEVANT DOCKET ENTRIES,
No. 1-78-28 The People of the State of New York
v. Roger Belton

May 24, 1978	—	Indictment charging defendant with Criminal Possession of a Controlled Substance in the 5th Degree filed.
May 31, 1978	—	Arraignment of defendant; not guilty plea entered.
July 1, 1978	—	Defendant's omnibus pre-trial motions filed.
July 17, 1978	—	People's answering affidavit in response to defendant's omnibus motions filed.
July 26, 1978	—	Oral argument on motion. Suppression hearing commenced; testimony of Douglas Nicot, for the People, direct and cross.
August 2, 1978	—	Suppression hearing continues; testimony of Douglas Nicot, cross. Findings of fact and conclusions of law orally placed on record. Suppression motion denied.
August 17, 1978	—	Defendant pleads guilty to reduced charge of Attempted Criminal Possession of a Controlled Substance in the 6th Degree.
August 29, 1978	—	Second felony information filed. Defendant sentenced to 1½-3 years in state prison. Defendant's motion for stay of execution of judgment pending appeal

filed. Order granting stay of execution of judgment pending appeal and fixing bail filed. Notice of appeal filed.

December 19, 1978 — Defendant's motion for extension of time to perfect appeal in New York Supreme Court, Appellate Division, Fourth Department filed.

January 19, 1979 — Order of the New York Supreme Court, Appellate Division, Fourth Department granting defendant's motion for extension of time to perfect appeal filed.

May 22, 1979 — Opinion and judgment of the New York Supreme Court, Appellate Division, Fourth Department, unanimously affirming defendant's judgment of conviction filed.

June 27, 1979 — Order granting leave to defendant to appeal to New York Court of Appeals and continuing bail filed.

August 29, 1979 — Defendant's motion for extension of time to perfect appeal in New York Court of Appeals filed.

September 4, 1979 — People's answering affidavit in opposition to defendant's motion filed.

September 18, 1979 — Order of the New York Court of Appeals granting defendant's motion for extension of time to perfect appeal filed.

September 26, 1979 — Defendant's motion to maintain appeal as poor person filed.

Indictment, Filed May 24, 1978

October 23, 1979 — Order of the New York Court of Appeals granting defendant's motion to appeal as poor person filed.

June 5, 1980 — Opinion and judgment of the New York Court of Appeals reversing defendant's judgment of conviction and dismissing indictment filed.

Indictment, Filed May 24, 1978

STATE OF NEW YORK
COUNTY OF ONTARIO COUNTY COURT

THE PEOPLE OF THE STATE OF NEW YORK

vs.

ROGER BELTON,

Defendant.

THE GRAND JURY OF THE COUNTY OF ONTARIO, by this indictment, accuse the defendant of the crime of CRIMINAL POSSISSION OF A CONTROLLED SUBSTANCE IN THE FIFTH DEGREE COMMITTED AS FOLLOWS:

The defendant, in the County of Ontario, on or about April 9, 1978, knowingly and unlawfully possessed one or more preparations, compounds, mixtures or substances of an aggregate weight of one-eighth of an ounce or more containing a narcotic drug, to wit: the defendant possessed 10.08 grams of cocaine.

James R. Harvey, District Attorney

Bunny Bell, Acting Foreman

1-78-28

Notice of Motion, Dated June 30, 1978

(SAME TITLE)

Sirs:

PLEASE TAKE NOTICE that upon the annexed affidavit of PAUL J. CAMBRIA, JR., sworn to on the 30th day of June, 1978, and upon all the proceedings heretofore had herein, a motion will be made in this Court on the 26 day of July, 1978, at 10:00 a.m. in the forenoon of that day or as soon thereafter as counsel can be heard for orders granting the relief requested in the affidavit annexed hereto, together with such other and further relief as may be just and proper under the circumstances herein.

DATED: Buffalo, New York
June 30, 1978

Yours, etc.

LIPSITZ, GREEN, FAHRINGER,
ROLL, SCHULLER & JAMES
PAUL J. CAMBRIA, JR., ESQ.,
Attorney for Roger Belton
One Niagara Square
Buffalo, New York 14202
(716) 849-1333

TO: JAMES HARVEY, ESQ.
Ontario County Courthouse
Main Street
Canandaigua, New York 14424

Affidavit of Paul J. Cambria, Jr., Dated June 30, 1978

(SAME TITLE)

STATE OF NEW YORK }
COUNTY OF ERIE } SS:
CITY OF BUFFALO }

PAUL J. CAMBRIA, JR., being duly sworn, deposes and says:

1. I am an attorney at law duly licensed to practice in the State of New York and I am a member of the law firm Lipsitz, Green, Fahringer, Roll, Schuller & James, with offices located at One Niagara Square, Buffalo, New York, 14202.

2. I am thoroughly familiar with all the facts and circumstances surrounding this case by reason of my own investigation and conferences had with the defendant, a review of the relevant pleadings, proceedings and the law in this matter.

3. The defendant stands charged with criminal possession of a controlled substance in the fifth degree in violation of P. L. §220.09(1). The defendant was arraigned on or about May 31, 1978, and thereafter the matter was set down for the filing of motions within the forty-five (45) day period provided for in CPL §255.20.

4. This affidavit is made on your deponent's information and belief, the sources of such information and the grounds for said belief being the pleadings herein, conferences had with the defendant and your deponent's investigation into the circumstances.

5. This affidavit is made in support of an application for a number of different forms of relief. The affidavit is divided into a number of different subheadings, each requesting an order granting different relief from the Court. There follows an index of the various forms of relief requested, together with the page number upon which they appear.

• • •

Affidavit of Paul J. Cambria, Jr., Dated June 30, 1978

MOTION TO SUPPRESS

52. The defendant respectfully moves, pursuant to Article 710 of the Criminal Procedure Law that any and all evidence of whatsoever kind and nature acquired directly or indirectly as a result of the search and seizure conducted of items of personal clothing of the defendant, or in areas in which the defendant had a legitimate expectation of privacy, specifically a jacket from which it is alleged that the subject controlled substances were discovered, together with any and all fruits obtained therefrom or thereby be in all respects suppressed.

53. On or about April 9, 1978, at approximately 9:50 a.m. on the New York State Thruway, Trooper Douglas Nicott stationed at Junius Ponds, New York, stopped a vehicle in which the defendant was a passenger, and which was owned by one Larry Vance, and was being driven by an individual other than the defendant. Such vehicle was also occupied by approximately four individuals.

54. Subsequently, Trooper Nicott ordered the defendant out of the car and directed him to "empty his pockets" and otherwise subjected his person to a search and seizure.

55. Officer Nicott thereafter picked up a jacket allegedly belonging to the defendant, opened a zipper pocket and allegedly discovered a controlled substance which is the subject of the indictment herein and a card bearing the name of the defendant, Roger Belton.

56. That such search and seizure was violative of the defendant's rights under the Fourth and Fourteenth Amendments to the United States Constitution and Article 1, Section 12 of the New York State Constitution as well as the New York State Civil Rights Law.

57. That said search and seizure was conducted in the absence of a warrant or probable cause, was not incident to a valid

arrest, nor made pursuant to any of the other recognized limited exceptions to the warrant requirement.

58. Under no circumstances did the defendant in any way knowingly and voluntarily consent to any such search and seizure, nor did he at any time give Trooper Nicott permission to search his belongings.

59. That immediately prior to the conduct of the search and seizure herein, defendant was committing no crime in the presence of the officer, nor did the officer have probable cause to so believe, nor was there any other legitimate and legal basis upon which the subject search and seizure may be based.

WHEREFORE, it is respectfully requested that the evidence seized herein which forms the basis for the indictment herein together with any and all fruits thereof be in all respects suppressed.

OTHER MOTIONS

60. Depending upon the Court's granting of the relief requested in these papers, the defendant respectfully reserves the right to make further and additional motions which may be required and advisable in light of the Court's ruling on relief sought herein.

61. It is further requested that the defendant have an opportunity to make any and all motions necessary in connection with the alleged statements made by him at the time of his arrest.

62. It is further requested that the Court grant such other and further relief as it may deem just and proper under the circumstances of this case.

/s/PAUL J. CAMBRIA, JR.
Paul J. Cambria, Jr.

(Jurat omitted in printing)

Affidavit of Roger Belton, Dated July 1, 1978

(SAME TITLE)

STATE OF NEW YORK }
COUNTY OF ERIE } SS:
CITY OF BUFFALO }

ROGER BELTON, being duly sworn, deposes and says:

1. I am the defendant in the above referenced case, and I am represented by PAUL J. CAMBRIA, JR., of Lipsitz, Green, Fahringer, Roll, Schuller & James, One Niagara Square, Buffalo, New York, 14202.

2. I have read my attorney's affidavit and the allegations set forth therein are true and accurate to the best of my knowledge and belief, and I join in them and join in my attorney's motion for suppression of the evidence herein.

3. That at no time on April 9, 1978, did I in any way consent to the search and seizure, nor did I in any way give permission to Officer Nicott to search any of the articles or areas involved.

WHEREFORE, it is respectfully requested that the Court grant the motion to suppress, and grant the various other applications made by my attorney on my behalf.

/s/ROGER BELTON
Roger Belton

(Jurat omitted in printing)

**Answering Affidavit in Response to Motion,
Filed July 17, 1978**

(SAME TITLE)

STATE OF NEW YORK }
COUNTY OF ONTARIO } SS:

JAMES R. HARVEY, being duly sworn, deposes and says:

1. That he is the District Attorney of the County of Ontario, New York.

2. That this affidavit is made in response to defendant's Omnibus Motion dated June 30, 1978.

• • •

12. MOTION TO SUPPRESS THE EVIDENCE OBTAINED FROM THE VEHICLE IN WHICH THE DEFENDANT WAS A PASSENGER

21. The search of the vehicle and defendant's belongings by Trooper Nicot was in all respects legally sufficient. The defendant's Constitutional Rights were in no way violated by Trooper Nicot. However, the People have no objection to the Courts conducting a hearing in regard to the lawfulness of the search which obtained the evidence which is the basis of the charge set forth in the indictment.

WHEREFORE, the People request an Order of this Court denying defendant's motion in all respects, with the exception of the demands which the People indicate that the defendant is entitled to as a matter of law, and for such other and further relief as to the Court may seem just and proper.

/s/JAMES R. HARVEY
James R. Harvey, District Attorney

(Jurat omitted in printing)

Transcript of Proceedings, Dated July 26, 1978 and August 2, 1978

STATE OF NEW YORK
COUNTY OF ONTARIO COUNTY COURT

The People of the State of New York

against

Roger Belton,

Defendant.

BEFORE:

Hon. George A. Reed, County Court Judge.

HELD:

July 26, and August 2, 1978 at a Regular Adjourned Term of County Court held in and for the County of Ontario at Canandaigua, New York.

APPEARANCES:

For the People, James R. Harvey, Esq., District Attorney

Attorneys for the Defendant, Lipsitz, Green, Fahringer, Roll, Schuller and James, BY: Paul J. Cambria, Jr., Esq., of counsel.

Roger Belton, the defendant, appears in person.

[5]

• • •

MR. HARVEY: Your Honor, the people are ready to proceed in regard to the

[6]

suppression in the case of the People v. Roger Belton.

We call as our first witness Douglas Nicot.

DOUGLAS NICOT, called in behalf of the people, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. HARVEY:

Q. State your full name please?

A. Douglas Nicot.

Q. What is your occupation?

A. Assigned to the New York State Police Troop T at Junius Ponds.

Q. How long have you been a New York State Policeman, Trooper Nicot?

A. Over twelve years.

Q. What are your primary duties with the troopers?

A. Investigating accidents and investigating the possibility of crime and patrolling the Thruway.

Q. I call your attention to April 9, 1978. Do you recall that day?

A. Yes, I do.

Q. Were you on duty that particular day?

A. Yes, I was.

[7]

Q. What area of the Thruway were you on duty, can you recall?

A. Yes. I was working Post 18 which is generally four townships which includes the Town of Phelps, Town of Manchester, Town of Farmington and Town of Victor.

Q. Now, Trooper Nicot, this is exclusively on the Thruway, is that correct?

A. That's correct.

Q. Did you have any particular device on your vehicle on that particular day?

A. Any particular device?

Q. Yes. Were you on radar duty?

A. No, I was not.

A. And did there come a time when you were in the area of the Town of Phelps on the Thruway that you noticed a vehicle behind you proceeding at a high rate of speed?

A. Yes, I was.

Q. Can you describe that vehicle?

A. Yes, a late model Chrysler, blue in color going west in the passing lane.

Q. Where were you located?

A. I was also located in the westbound, in the passing lane.

Q. When you first observed this vehicle, what did you first do?

[8]

A. When I first observed it, it was rapidly gaining on my patrol vehicle so I pulled my patrol vehicle to the driving lane or right hand lane of the Thruway and continued to observe the vehicle and there came a time when this vehicle did pass my patrol car.

Q. Okay. Did you have an opportunity to look at your speedometer at about the time the vehicle passed you?

A. Yes. I clocked this vehicle at a time when my patrol car was not gaining on the observed vehicle and it was not gaining on me and it was at that point I determined the vehicle was exceeding the speed limit and it was going at about seventy-five miles per hour.

Q. Okay. What did you do then?

A. Pulled my patrol vehicle to the right hand driving lane and at that point the vehicle I was observing passed my patrol vehicle.

Q. Okay. What is the speed limit on the New York State Thruway, do you know?

A. Fifty-five miles per hour.

Q. After your vehicle was passed by the late model Chrysler, what did you do?

A. At that point I continued behind the Chrysler for a short period of time and did motion it over, turned my

[9]

grill lights on and a vehicle did pull over to the north shoulder of the road.

Q. What type of vehicle were you driving on patrol on this particular day, do you recall?

A. Yes. It was a 1976 Plymouth, an unmarked patrol car.

Q. Okay. And after you pulled this vehicle over, what did you do next?

A. At that point I proceeded to walk up to the driver's window.

Q. Let me get this straight. Is your vehicle in back of the Chrysler?

A. Yes, it was.

Q. Okay. Go ahead.

A. I walked up to the Chrysler, to the driver's door, and the driver rolled the window down and I asked for a license and registration.

Q. About what time is this now?

A. About 9:00 a.m.

Q. And then what happened?

A. The driver produced a license and a registration was also produced at that time and at that point I did smell marijuana burning or burned marijuana from within the vehicle.

[10]

MR. CAMBRIA: That is objected to, Your Honor.

MR. HARVEY: Your Honor, I will qualify the witness.

THE COURT: The objection at this time will be sustained.

BY MR. HARVEY:

Q. Trooper Nicot, have you ever had any schooling in regard to drug detection?

A. Yes. I have been to three different schools.

Q. Okay. Would you tell the court where these schools were held and for what time in each school?

A. 1966 I graduated from the New York State Police Academy, the Academy being at Oneonta State Teachers College and also in Albany and in 1974 I graduated from the Bureau of Narcotic and Dangerous Drug School.

Q. How long a course was that?

A. That was a two week course.

Q. Where was that held?

A. That was held at the State Police Academy also in Albany but it was run by the Department of Justice or the old Bureau of Narcotic and Dangerous Drug.

Q. Did your education include drug detection?

[11]

A. Yes, it did.

Q. In that case tell the court how you determined its marijuana exclusively?

A. With marijuana alone, the history of the plant, the different types of marijuana, the identification of both male and

female plants, the identification of the seeds, also the smell of burning marijuana and also field tests that were conducted for positive identification or belief of positive identification.

Q. These were all done clinically as part of the class, is that correct?

A. Yes.

Q. Within the laboratory situation. You said there were three schools. What was the third?

A. I recently graduated from the Drug Enforcement Administration School also run by the Department of Justice.

Q. How long a school was that?

A. Also two weeks.

Q. Where was it held?

A. Also at the State Police Academy in Albany.

Q. What did you do in regard to the detection of marijuana in this particular case?

[12]

A. Basically that same thing. All of the afore mentioned facts were brought out plus some new. Observing seeds under a microscope. Marijuana seeds have a particular characteristic that most seeds do not.

MR. CAMBRIA: I'm sorry. Do we have a date on the last school?

THE WITNESS: Last week.

MR. CAMBRIA: Then I object to it, Your Honor, as being after the time of the search we are talking about.

THE COURT: Overruled. It might be receivable subject to confirmation of something he observed at an earlier time. It may go to its weight but not admissibility.

BY MR. HARVEY:

Q. Now, you testified at the time the license and registration were produced in this vehicle you were on what side of the vehicle?

A. I am on the driver's side.

Q. Could you tell us whether or not the window was up or down on that side?

A. The driver rolled the window down when I approached the side of the vehicle and the window remained down during

[13]

the process of getting the license and registration.

Q. Then what happened?

A. That was at the point when I determined there was burned marijuana in the vehicle or the aroma from burnt marijuana coming from the car.

Q. Okay. What did you do then?

A. At that point I asked the driver a series of minor questions as to who owned the vehicle. The vehicle was registered to a female who resided in Buffalo who was not with the vehicle. Nobody in the vehicle was a relative of the owner of the vehicle.

Q. How many people were in the vehicle? Did you notice at this time?

A. Yes. There were four colored males.

Q. By colored, do you mean black?

A. Yes, I do.

Q. Okay. Go ahead.

A. Two in the front seat, two in the back seat.

Q. Four all together?

A. That's correct.

Q. Go ahead. What did you do next?

A. At that point I advised the driver that I did smell marijuana and to please step out of the vehicle and in

[14]

succession the four occupants were taken from the vehicle and placed under arrest for unlawful possession of marijuana.

Q. Okay. Now, did you later determine the identification of all these four occupants of the vehicle?

A. Yes, I did.

Q. Do you recognize the defendant in this case?

A. Yes, I do.

Q. Okay. Would you point to him and state his name?

A. His name is Roger Belton.

MR. HARVEY: For the record, he has pointed out the defendant at counsel table.

BY MR. HARVEY:

Q. Where was he located in the vehicle, do you recall?

A. Yes. He was sitting in the rear of the vehicle behind the driver.

Q. Okay. And who got out of the vehicle first?

A. The fellow who presented a license in the name of Vance who was driving the vehicle who later turned out to be Ronald Sessum.

Q. Okay. Who got out next?

A. The other passenger in the front seat who was a Mr. Brown, Jerry Brown.

[15]

Q. Okay. Who got out next?

A. Mr. Vance.

Q. Okay.

A. And finally, Mr. Belton.

Q. Okay. And you placed all four of the individuals under arrest for unlawful possession of marijuana at that time?

A. Yes, that's correct.

Q. Then what did you do?

A. With this particular defendant?

Q. Yes.

A. Each particular defendant, individual, was patted down after he got out of the car for the possibility of a weapon and I split them up into four separate areas of the Thruway at this time so they would not be in physical touching area of each other and then I observed what was in the car.

Q. Okay. You went back to the car after you got all the defendants segregated?

A. Yes. We are all in close proximity of the car.

Q. All around the car?

A. Yes.

Q. You went back to the car for what purpose?

A. To retrieve an envelope which I had seen on the floor

[16]

boards of the car, a small manila envelope approximately four inches high and approximately two inches wide.

Q. You saw a small envelope where in the car?

A. On the floor boards, the front floor boards. It was on the floor boards of the front seat near the passenger side.

Q. What did you do next with this envelope?

A. I determined that it did contain a trace of marijuana in the envelope.

Q. Were there any markings on this envelope?

A. Yes. The envelope had been stamped "Supergold." I seen these initials before and evidently it's a way of distributing—

MR. CAMBRIA: I object to "evidently," Your Honor.

THE COURT: The court will disregard it.

BY MR. HARVEY:

Q. Have you seen this type of envelope before?

A. Yes, I have.

Q. Okay. Go ahead. What did you know it to be in your experience?

A. Containing marijuana.

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Q. You say there was a substance in the envelope?

A. Yes, there was.

Q. Which you determined to be, with your experience, marijuana?

A. Yes.

Q. What did you do next?

A. At that point all four subjects were brought together and I retrieved my summons book from my patrol car and I read their rights under the Miranda decision to them jointly and then I asked each one individually if they understood their rights and they all answered in the affirmative. At that point, to check for further contraband, each individual was searched, the contents of their pockets was searched individually and then I completed a search of the vehicle.

Q. Okay. What else, if anything, was in the vehicle at this time, any items of clothing?

A. Yes.

Q. Go ahead.

A. During the search of the vehicle a black leather jacket was located in the back seat, in the center of the back seat. A further search revealed that there was a United States twenty dollar bill in one pocket and

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contained in that twenty dollar bill was a white crystalline powder. In the opposite pocket there was a plastic bag containing a larger amount of white powder.

Q. I show you People's Exhibit 1 marked for identification and ask you if you recognize it, Trooper Nicot?

A. Yes. I believe this to be the same twenty dollar bill I retrieved from the pocket of the black leather jacket.

Q. How do you recognize it?

A. The evidence tag that was secured at State Police Junius Ponds, New York by myself giving a description of the bill and the contents of the white powder.

Q. Okay. Around the twenty dollar bill?

A. That's correct.

Q. I show you People's Exhibit 2 marked for identification and ask you if you recognize it?

A. Yes, I do.

Q. What is it?

A. That is the plastic bag that was retrieved from the opposite pocket of the black leather jacket containing a white crystalline powder. It was also placed in a bag by myself along with this evidence tag signed by me.

Q. And your testimony was that People's Exhibits 1 and 2

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marked for identification were found in opposite pockets, is that correct, in the black jacket?

A. They were.

Q. What, if anything, else did you find in this jacket?

A. There were two marijuana cigarettes in a third pocket. This jacket contained multiple pockets and there were two marijuana cigarettes rolled up, unsmoked, and a further search of the car revealed approximately five or six partially smoked marijuana cigarettes in the ashtrays of the vehicle.

Q. Okay. Go ahead. What else, if anything, did you find in the black jacket?

A. There was some identification in the name of Roger Belton, a blue-cross and blue shield card, and I believe there was another card, possibly a union type card with his name on it also.

Q. Okay. Do you still have these items in your evidence locker?

A. They are in my personal locker, yes.

THE COURT: You say "These items." You are now referring—

THE WITNESS: The identification card only.

THE COURT: What happened to the

[20]

two marijuana cigarettes?

THE WITNESS: All four subjects were processed through Justice Court in the Town of Phelps, all four for unlawful possession of marijuana. The marijuana was forwarded for destruction to the State Police Laboratory in Albany.

THE COURT: Is that also true of the five or six partially smoked butts in the ashtrays?

THE WITNESS: Yes. I believe they were all forwarded. I did retain the empty bag marked "Supergold." I have that in my possession.

BY MR. HARVEY:

Q. Along with the identification you found in the jacket?

A. That's correct.

Q. Now, after finding this identification of the defendant Roger Belton in this black jacket, did you have any conversation with Mr. Belton?

A. Yes, I did. I had conversation with all four defendants at that time.

Q. Go ahead.

A. I asked first of all if anyone owned the jacket. They all denied ownership.

[21]

MR. CAMBRIA: Your Honor, at this time I'm going to object to any statement attributed to Mr. Belton since I was told there were none.

Now, if there are, then apparently it's part of the statement.

THE COURT: The question is not objectionable. It's premature. If there was an answer in the affirmative, then you may renew the motion.

BY MR. HARVEY:

Q. Go ahead.

A. All four subjects denied ownership of the jacket and a count of the clothing determined that this was a fifth overcoat or jacket type piece of garment that was in the vehicle. There were five outer garments.

Q. Four defendants, five jackets in the vehicle?

A. That's correct.

Q. Did there come a time you placed all four defendants under arrest for possession of the white powder I believe you recognized as cocaine?

A. Yes.

Q. Is that correct?

[22]

A. That's correct.

Q. What did you do with the black jacket in which People's Exhibits 1 and 2 in the identification of Mr. Belton came from?

A. After the jacket was searched thoroughly it was returned to Mr. Belton when he was released from the Ontario County Jail after posting bail.

MR. HARVEY: Thank you. I have no further questions.

CROSS EXAMINATION BY MR. CAMBRIA:

Q. Officer, did you make any report or memo, note in connection with this case?

A. Yes, sir, I did.

Q. All right. Do you have those with you?

A. No. They have been forwarded through the proper channels.

Q. Now, Officer, have you testified in hearings such as this before?

A. Not in this courtroom, no.

Q. Well, in other courtrooms, is that correct?

A. Yes, I have.

Q. All right. And, as a matter of fact during the course of your examination attorneys have asked you for those

[23]

notes, have they not?

A. Yes.

Q. So therefore you expected to be asked for those notes here today, didn't you?

A. No, I didn't.

Q. You didn't?

A. No, I did not.

Q. You are telling me that on several occasions or let me ask you, on several occasions in the past have you been asked for notes of prior reports you have made?

A. I don't recall specifically ever having been asked for notes.

MR. HARVEY: Your Honor, I object. I don't see the relevance to this particular testimony. He testified he made the reports and submitted them through channels. He doesn't have them today. I can't see anything else that is relevant.

THE COURT: We have a discovery motion. If he made the reports, his credibility is just as, he has the same right to be attacked in this proceeding and counsel is entitled to have the notes for

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purposes of cross examination. He is probably entitled to an adjournment until they are produced.

MR. CAMBRIA: I will continue to cross examine. My request stands for the prior reports and notes.

THE COURT: They have been denied until such time as the witness testifies and that has related to the trial and you also have the right and I now grant you an order that the notes on prior reports be furnished to you for your purposes in cross examining the witness in this proceeding.

MR. CAMBRIA: Thank you, Your Honor.

BY MR. CAMBRIA:

Q. Officer, you testified before the Grand Jury?

THE COURT: What are you going to do, ask for an adjournment?

MR. CAMBRIA: I am, Your Honor.

THE COURT: You are entitled to it. They are not available?

THE WITNESS: Judge, all the reports for this case have

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been forwarded. I have some personal—

THE COURT: Forwarded where?

THE WITNESS: Forwarded through our channels, arrest reports and investigative records. I have personal notes as to who was sitting where, referring to—

THE COURT: Counsel has an absolute right to have prior records for the purpose of impeachment under the cases.

THE WITNESS: I can obtain those.

THE COURT: That blows this hearing out of the water it looks like to me.

MR. HARVEY: I suggest, Mr. Cambria continue. If he still wants another shot at the witness, it makes no difference to me.

MR. CAMBRIA: I would be willing to venture into some cross, Your Honor, but I would really—

THE COURT: Where you present in Phelps? I am concerned now. I don't know whether the prosecutor intends to call the other witnesses to confirm the smell of

[26]

marijuana. There has been no evidence authorizing a pat down as I see it here so far. There has been nothing to indicate what traffic violation, perhaps which marijuana. There has merely been a violation. At that time there would have been no authority for a pat down. The stuff was not found as a result of a pat down. The presence of burned cigarettes in the cigarette ashtray would tend to

reenforce the credibility of the defendant — excuse me — of the witness since we had a whole line of sniffing cases. Did you defend this defendant in Phelps Justice Court?

MR. CAMBRIA: No, not at all, Your Honor.

THE COURT: Did you any defendant?

MR. CAMBRIA: No, sir. They all were unrepresented.

THE COURT: What was presented there?

MR. HARVEY: On the violation

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Mr. Cambria wasn't involved. The defendants went in and pled guilty right out of the box so to speak and the other matter was held for the preliminary examination.

THE COURT: Violation of a misdemeanor?

MR. CAMBRIA: Charged with a violation.

My understanding, Your Honor, is a plea was extracted before they were released. At that time, while they were in custody, there were some representations made so, as I say, I am not even convinced of the validity of the plea but, nonetheless, it was a violation.

THE COURT: Well—

MR. CAMBRIA: Your Honor, obviously it's important to me to see the other eports, all the reports.

Ultimately, it still seems to me, we are getting down not only to a pat down but then too—

THE COURT: Pat down seems to go

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out of this case since nothing was discovered. It's just part of the res gestae. It didn't seem to me to be offensive since it didn't produce anything.

MR. CAMBRIA: I think –

THE COURT: It didn't produce anything on the testimony so far.

MR. HARVEY: No.

THE COURT: Then you have smell and you have a warrantless search for contraband.

MR. CAMBRIA: In the jacket. If we are talking about burned marijuana, it seems to me being in a ashtray as opposed to a jacket, even if we assume that the smell is valid and genuine and so not unlimited authority to search.

THE COURT: You are into a limited search area although after the arrest was made. You and I are both familiar with the line of cases.

Are you willing now to proceed without the officer's reports? If not, I would

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think in the interest of justice you are entitled to an adjournment until they can be produced. I am reluctant to do that but you are on the trial calendar but your case is at the tail end so I can squeeze you in for a continuance of this hearing until you are reached for trial.

MR. CAMBRIA: Your Honor, I wonder if we could conduct perhaps the rest of the or as far as I can go today?

THE COURT: Perhaps subject to recall?

MR. CAMBRIA: Subject to recall and asking for the reports.

THE COURT: Mr. Harvey?

MR. HARVEY: Whatever the court and counsel desire, Your Honor, it makes no difference to me. I certainly will make, have Trooper Nicot produce the records. That much I can assure the court will be done. It will probably be by this afternoon.

THE COURT: All right. We will proceed without prejudice to the right-

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What am I going to do about making a decision and findings of facts and conclusions of law?

MR. CAMBRIA: Your Honor, I think we might—

THE COURT: You can tell me whether you wish to continue or close at the end.

MR. CAMBRIA: All right. Thank you.

BY MR. CAMBRIA:

Q. Officer, did you testify before the Grand Jury in this case?

A. Yes, I have testified.

Q. Did your testimony there relate to the subject matter to which you have testified to today?

A. Yes.

MR. CAMBRIA: May I have the Grand Jury testimony?

MR. HARVEY: Sure.

THE COURT: So ordered.

Woud you put on the record the page numbers you are furnishing please.

MR. HARVEY: Sure will, Your Honor.

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I am providing counsel with pages 3 through 20 of the Grand Jury testimony of this witness.

MR. CAMBRIA: Thank you. May I have a moment, Your Honor?

Thank you, Your Honor.

THE COURT: Have you had adequate time to examine the minutes?

MR. CAMBRIA: Yes, I believe so.

THE COURT: Then you may proceed.

BY MR. CAMBRIA:

Q. Now, Officer, you testified here you were driving on this Thruway and this car started to approach you from the rear, is that correct?

A. That's correct.

Q. And you were passing in the passing lane, is that correct?

A. That's correct.

Q. And you started to speed up, is that correct, and the car caught up to you, is that true?

A. No. I speeded up to the point where the car was not gaining on me anymore.

Q. All right. And then you pulled over and ultimately the

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car passed?

A. That's right, After I got a clock on the passing vehicle in the passing lane, I pulled in the driving lane and allowed the vehicle to pass.

Q. Now, I believe you walked up to the driver's side of the vehicle and the driver rolled the window down and you asked for the registration and license and he produced it?

A. That's correct. He pulled a valid license out that was not—

Q. And he produced the registration?

A. That's correct.

Q. And I think at sometime subsequently you found out that the license that was produced wasn't his driver's license, is that correct?

A. That's correct.

Q. All right. Now, is it your testimony that the first person you took out of the car was the driver?

A. That's correct.

Q. And did you have your service revolver pulled at that time?

A. No. I had no reason to.

Q. All right. And you took the driver out of the car, is that correct?

[33]

A. I just asked him to step out of the car, yes.

Q. And when the driver— Did you take all four out at once or did you take the driver out and then the others in order?

A. In order, yes. It was a two door vehicle and it was hard to get—

Q. It was a two door vehicle?

A. I believe it was, yes.

Q. Are you sure about that?

A. I'm not positive but, as I recall, it was.

Q. All right. Nonetheless, you took the driver out and then you searched the driver, is that correct?

A. Just patted him down, I didn't search every content of his pockets. I just wanted to make sure he didn't have a weapon with him.

Q. Did you tell him to empty his pockets?

A. At that point, no, I did not.

Q. Your testimony is you patted him down on the outside of his pockets?

A. That's correct.

Q. Now, in the meantime, the other three people were inside the car, is that correct?

A. That's correct.

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Q. So then did you take them out one at a time, is that correct?

A. That's correct.

Q. And you patted them all down, is that true?

A. Right.

Q. All right. And you never had your own service revolver pulled at that time? You were working on one person at a time?

A. That's correct.

Q. All right. Now, you didn't find any weapons, is that correct?

A. I did not.

Q. All right. And now you have four people outside, is that true?

A. That is true.

Q. And they were outside because you directed them to be outside, is that correct?

A. That's correct.

Q. And had you arrested the driver for speeding?

A. Yes.

Q. All right. Now, you testified here—

THE COURT: At what stage did you place the driver under arrest for speeding?

[35]

THE WITNESS: As he was getting out of the car Judge, I informed him the reason I stopped the vehicle is that he was speeding and I would issue him a summons for exceeding the speed limit. The summons wasn't physically written at that point but the driver was aware of the fact why I stopped the vehicle and he would be given a summons for speeding.

BY MR. CAMBRIA:

Q. Now, do you recall testifying before the Grand Jury that you asked all of the suspects, or subjects as you said, to get out of the car together, all at once? Do you recall saying that?

A. That would have been physically impossible. They all did get out.

Q. Excuse me, Officer. Do you recall making that statement.

A. No, I do not.

Q. All right. Now, Officer, midway down Defendant's A there is a question to you: What did you do then? And the answer is: At that point, I asked the subjects to exit the car together, driver from the driver's side out

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and then the other ~~three subjects~~ exited from the passenger's side, the north side of the Thruway.

Did you make that statement?

A. Yes, I did.

Q. Now, did you have all of them get out at the same time or does this statement mean something else?

A. Well, they didn't all four of them just jump out at the same time.

Q. I understand that.

A. They were all asked to get out of the car. They were individually patted down as they got out of the car.

Q. The question is this: Did you, as you said on direct examination, were you patting one down with the other three in the car or did you get all four out of the car and then start patting them down?

A. As the driver got out of the car, I did pat him down. He walked to the rear. I followed him to the rear of the vehicle that was stopped. At that point I walked to the driver – excuse me – passenger side of the car where Mr. Brown exited from the front seat and he was patted down. The two subjects in the back seat then exited through the passenger's side.

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Q. So you didn't do them all at once?

A. The were asked to get out. They were getting ready to get out of the vehicle. One subject had been sleeping in the vehicle. One, I believe, had his shoes off so it took a matter of seconds for them to exit the vehicle.

Q. Now, Officer, is it your testimony here today that you immediately placed them under arrest for a violation of possession of marijuana?

A. As they were patted down, you know, they were split up and then I retrieved the bag which contained marijuana.

Q. Now, let me ask you a question. All right. So it's a fact then, when you got them all outside, they were not as yet under arrest for violation of marijuana, correct?

A. That's correct.

Q. Prior to the pat down they were not under arrest for violation of marijuana, is that correct?

A. That's correct.

Q. Now, after the pat down is it your testimony that you look into the car and you see this envelope we are talking about?

A. Prior to that I had smelled the marijuana.

Q. I understand that. After the pat down did you look in and see this envelope?

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A. I seen it previously. I went back to retrieve it after the pat down.

Q. Now, I believe you said there was a trace of marijuana in the envelope?

A. That's correct.

Q. You didn't see that from the outside?

A. No.

Q. Until you opened it?

A. No. I saw the envelope stamped "Supergold" in large letters and I have seen envelopes similar to that before.

Q. Now, let me ask you a question: Don't those envelopes contain cigarette papers usually?

A. No, they do not. That contains marijuana and that is the way it is bought. Also retrieved was a—

Q. Let me back up a second. What you are saying is: You see an envelope and this envelope says "Supergold" on it and that is a bag of marijuana. In other words labeled right on it "Marijuana Supergold".

A. It was labeled "Supergold" and I have seen that before, the same type of envelope.

Q. How many times?

A. I think on two different occasions prior to this occasion I have seen envelopes stamped "Supergold" envelopes of

[39]

the same size, same type of stamp and in both cases or both points in question they did contain marijuana or traces of marijuana.

Q. Okay. Now, in this particular case you saw this envelope and you saw the markings on it but you couldn't see the marijuana, right?

A. No, I only smelled it, true.

Q. And obviously the envelope itself, if that is what was there and nothing else, that is not a crime?

A. No, it wasn't.

Q. You wouldn't arrest someone for that, would you?

A. The envelope?

Q. Yes.

A. There was enough—

Q. Just a minute. Just the envelope?

A. No, I wouldn't make an arrest.

Q. That envelope that said "Supergold", if it didn't have anything in it, you wouldn't have arrested them for that, is that correct?

A. No, I would not.

Q. So in this particular case you had the basis for your arrest when you saw what was in the envelope, is that correct?

[40]

A. No. I would say—

Q. Excuse me. Is that when you felt you had the basis to arrest them for violation of marijuana?

A. No.

Q. All right. When was it?

A. My basis for the arrest is when I first approached the vehicle and smelled the marijuana. What I was trying to determine is how many in the vehicle were smoking and how much more contraband was in the vehicle.

Q. Let me ask you this question. You mean to tell me you arrested them on the smell alone?

A. No.

Q. All right. All right then, what did you arrest them on?

A. What did I arrest them on?

Q. Yes.

A. What I arrested them on was the fact I did retrieve an envelope that did contain a small amount of marijuana.

Q. Okay.

A. Which previously I had smelled marijuana which led me to believe marijuana was present in the vehicle.

Q. Let me ask you this: If you just smell it and never found anything, would you have arrested them?

A. If I just smelled it and I didn't find anything?

[41]

Q. Right.

A. I wouldn't have the basis for an arrest.

Q. Okay. If you just found the envelope and you had smelled it but you hadn't found anything in the envelope, would you have arrested them?

A. If I had just found a plain envelope?

Q. No, that envelope and nothing in it and your smell, would you have arrested them?

A. No, I would not.

Q. So, in other words, when you saw the stuff in the envelope, that is when you had the basis to arrest them, is that correct?

A. That was the point when they were placed under arrest.

Q. Now they had already been taken out of the vehicle and they had been patted down, is that correct?

A. That's correct.

Q. All right. So, in other words, you directed them to get out of the vehicle, is that true?

A. That is true.

Q. By doing that you caused them, obviously, to open the doors on the vehicle and get out of the vehicle, is that true?

A. That is correct.

[42]

Q. Now, you say when you came up to the vehicle you say you smelled burning marijuana, is that true?

A. Burnt marijuana.

Q. Did you go— Well, strike that. Let me ask you this. I take it you patted them down all outside and then you go and retrieve the envelope?

A. I did.

Q. Or did you search the jacket first?

A. No, I retrieved the envelope first.

Q. Okay. And then did you go into the ashtrays and look in the ashtrays?

A. Yes, I did.

Q. All right. Was this before or after you searched the jacket?

A. Before.

Q. Okay. Therefore, you were looking for this burnt marijuana you said you smelled, is that correct?

A. That's correct.

Q. And you found it in the ashtrays?

A. I found some roaches or partially burned cigarettes in the ashtray. I could not tell if they had been recently put out or they had been there previously.

Q. Okay. But in any event the smell you are talking about

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is the result of something that was burning, is that true?

A. That is true.

Q. So you went to that area of the car where burning things are usually put and that is the ashtrays, right?

A. Correct.

Q. Now, this jacket we are talking about with the pockets that you say contained the alleged cocaine here, that was zipped up, wasn't it?

A. I think that jacket contained four or six pockets.

Q. My question is: The pockets contained zippers and the zippers were zipped up?

A. The twenty dollar bill or you are referring to the plastic bag?

Q. The pocket containing the alleged cocaine. Let's say the plastic bag and make it perfectly clear.

A. The plastic bag was not in a pocket zipped up. The twenty dollar bill—

Q. Which was zipped up?

A. That was zipped up, right.

Q. Okay. So now what you have done then is you have actually searched the entire car, everything you found in the car?

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A. And the contents, correct.

Q. And the cocaine search we are talking about came after the marijuana search was completed, is that correct?

A. No, I don't search for one particular drug and then go back and search for another particular drug.

Q. You went into the ashtrays, did you not?

A. Yes, I did.

Q. Then the jacket search came after that, is that correct?

A. Yes.

Q. Did you pat the jacket down before you searched or did you go right into it, start taking things out?

A. No, I believe I patted it down.

Q. Did you feel a weapon?

A. No, I did not.

Q. Now, I take it first of all, Officer, the people in the car were initially detained as a result of your traffic violation, is that correct?

A. No, that is not correct.

Q. Well, what was the first thing that made you stop them?

A. The speeding.

Q. Okay. So you initially stopped them and detained them as a result of a traffic violation, is that correct?

A. No. If it had only been a traffic violation, they would

[45]

not have been detained.

Q. All right, the smell of marijuiana.

A. That's correct.

Q. That is what made you detain them?

A. That's correct.

Q. Now, Officer, is it your testimony here that you never told any of these people when they got out of the car to empty their pockets?

A. Not when they got out of the car, no, sir.

Q. Did you do that at anytime?

A. Yes, I did.

Q. When was that?

A. After they were placed under arrest, after they were advised of their rights and prior to transportation in my car.

Q. And I take it that was after you found this residue in the envelope we are talking about?

A. Yes.

Q. Did you test it at the scene, the residue?

A. No, I don't have means to test it at the scene.

Q. How much are we talking about in this envelope?

A. In the envelope, just a very minor case.

Q. Well, was it a seed?

[46]

THE COURT: Do we have a glass bag and envelope in this case?

MR. CAMBRIA: Yes. We are talking about the envelope on the floor, right?

MR. HARVEY: The envelope with marijuana.

THE WITNESS: A manila colored envelope that was on the floor.

BY MR. CAMBRIA:

Q. All right, how much was in there? You said a trace. What are you talking about seeds, stalks?

A. Enough of the seeds to identify it and yes, there was some small pieces of leaf material.

Q. But I take it you had to pick the envelope up, open it up and look in it to see this material, is that correct?

A. Yes, I did.

Q. Was there any smoke emanating from this envelope?

A. No.

Q. Was smoke or anything emanating from the jacket?

A. No.

Q. Okay. So you didn't smell burning marijuana in the jacket and you didn't smell it in the envelope specifically?

A. Specifically, no. It was just the odor was present in the car.

[47]

Q. In the car, okay.

MR. CAMBRIA: Pardon me one moment, Your Honor.

Your Honor, I believe that would be all I would have at this time until I acquire the notes or reports.

THE COURT: The next witness on direct.

MR. HARVEY: No other questions.

THE COURT: The people rest?

MR. HARVEY: That's correct.

THE COURT: Do you wish to have a few minutes?

MR. CAMBRIA: As I say, Your Honor, we are not going to put anything on at this time although I would like—

THE COURT: No. If you have taken this procedure — Well, I want to dispose of it here. Are you asking for a continuance?

MR. CAMBRIA: Your Honor, I would be prepared at this point to do this in two steps.

[48]

THE COURT: What I want to do — Of course, you have legal rights.

Mr. CAMBRIA: What I would like to do, Your Honor, frankly, based on the testimony we received so far, the people having the obligation to go forward to sustain the search into the jacket—

THE COURT: Make your appropriate motion.

MR. CAMBRIA: With regard to that, I would obviously like to under the circumstances as well as if the court denies it.

THE COURT: I am thinking about the procedure here. Your motion may be premature if you are going to request notes and enumeration of the exhibits, what happened to the envelope and tracings through the police records, the marking identification.

If the roaches were seized and subsequently destroyed, there should be a record concerning that, all relating to

[49]

credibility. It seems to me a motion to dismiss at this time would be premature. You are going to try your case the way you want to.

MR. CAMBRIA: All I was saying, Your Honor, is I would like to make the motion but subject to denial being able then to reopen.

THE COURT: All right then, your motion to dismiss for failure to prove facts sufficient to deny an order of suppression at this time is denied for the following reasons:

You may step down, Officer.

This is not the case of a routine, an isolated road check. The Officer had, and I find beyond a reasonable doubt—

MR. CAMBRIA: Excuse me, Your Honor. May I say this, that it seems to me that if these other matters are produced for me and I am able to cross examine the officer, then it seems to me findings of fact would be premature.

[50]

THE COURT: But in order to deny your motion, I have to state a basis.

MR. CAMBRIA: Then I think the motion should not be made at this time, it should be withdrawn and we go through the rest of it.

THE COURT: All right, it will be continued.

Transcript of Proceedings (Continued)
August 2, 1978

[2]

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MR. HARVEY: Trooper Nicot?

THE COURT: You are still under oath, Trooper Nicot.

The people rested, according to my notes.

MR. CAMBRIA: I think this is the people's witness.

MR. HARVEY: Cross.

MR. CAMBRIA: This is cross of the people's witness.

CROSS EXAMINATION BY MR. CAMBRIA CONTINUED:

Q. Trooper, my recollection is that last week when you testified, you said that you came up to the car on the Thruway

and that at a particular point in time you smelled the odor of burning marijuana, is that correct?

A. Burnt marijuana, yes, sir.

Q. And at that time I believe you also testified that eventually you ordered these fellows out of the car, is that correct?

A. That's correct.

Q. You patted them down, is that correct?

A. That's correct.

Q. And then you went back into the car and looked at an

[3]

envelope which said "Pure gold," something such as that on it, is that correct?

A. "Supergold," that's correct.

Q. All right, supergold. Then you looked in the envelope, is that correct?

A. Yes, that's correct.

Q. And discovered the residue of marijuana or what you believed to be marijuana, is that correct?

A. There was marijuana, yes.

Q. Then I believe you testified you arrested the defendants for possession of that, is that correct?

A. Yes, that's correct.

Q. I take it at that point and this was before you got to the jacket, is that correct?

A. That's correct.

Q. So at that point in time it was fairly clear you had at least one arrest, is that correct?

A. No, I had four.

Q. I'm sorry. You had four people under arrest for possessing marijuana, is that correct?

A. That's correct.

Q. And this was prior to the time you discovered the material in the jacket, is that correct?

[4]

A. That's correct.

Q. All right. Now I take it at that point in time, let's assume you haven't found anything else, it's obvious these guys were under arrest and they were going in for marijuana, is that correct?

A. They were under arrest, yes.

Q. Okay. Now, Officer, eventually you say you came around and looked into the jacket, is that true?

A. Yes, during the search of the car the jacket was searched.

Q. Okay. And I believe you testified at the time you did this these fellows were outside the car, is that correct?

A. That is correct.

Q. Now, I believe you also testified that the jacket had some pockets in it and you found these items in the pockets, is that correct?

A. That is correct.

Q. And one of them was zippered, is that true?

A. Pardon me?

Q. One of them had a zipper on them and it was zippered?

A. Two of the pockets had zippers.

Q. Okay. Two of them were zippered?

A. That's correct.

[5]

Q. And in one pocket you found a twenty dollar bill, is that correct?

A. That's correct.

Q. And in another pocket or perhaps the same one you found a blue cross and blue shield card, is that true?

A. There was a blue cross and blue shield card, yes.

Q. Found in one of the pockets?

A. Yes.

Q. Now, you actually picked the jacket up, did you not? I mean, you had it right in your hand, is that correct?

A. Yes, I did.

Q. That was before you went into it?

A. I don't recall whether before I reached in the pocket or not.

Q. At that point in time though, you put the jacket in your possession, is that true?

A. I searched the jacket, yes, in the car.

Q. Did you take it with you?

A. I don't recall whether I took it to the station or not.

Q. You don't know if you ever took it to the station?

A. I believe I did. I'm not positive.

Q. Well, would it refresh your recollection that you testified last week that you had it and that at the end

[6]

of the proceedings before the Judge you gave it back to somebody for the family, do you remember?

A. Yes. It was returned to the defendant.

Q. So you took it with you from the scene down to the police station, is that correct?

A. I don't know if it ever was in the police station.

Q. Well, where did you take it?

A. It may have remained in my patrol car. I'm not sure.

Q. But, nonetheless, it was in your possession?

A. Yes, it was.

Q. Now, where did you take these gentlemen from the scene on the Thruway? Where did you go?

A. Back to the state police station at Junius Ponds, New York.

Q. All right. And did you make arrangements for a Judge to appear?

A. Yes, there was a Judge made available.

Q. All right. And was he made available as a result of a call placed by you?

A. Yes.

Q. Did you do that while you were on the Thruway?

A. Yes.

Q. So apparently he was waiting for you, is that correct?

[7]

A. He was after I called him at the station. I called him from the Thruway Station.

Q. All right. So then he was alerted or you attempted to have him alerted as a result of your call on the Thruway, is that correct?

A. No. I called him on the telephone at the station.

Q. Did you make any call prior to that time?

A. Call to the Judge?

Q. Yes.

A. No, I did not.

Q. All right. So eventually the Judge then shows up at the station?

A. No.

Q. I'm sorry. Did you take the defendants to the court?

A. That's correct.

Q. And is that close to the station?

A. No.

Q. How far away is it?

A. It's about six miles, seven miles.

Q. All right. It's not a real long distance?

A. No.

Q. So you took all the defendants there and the charge laid against them included this charge for marijuana

[8]

possession, is that correct?

A. The charges were written out formally at the state police station in Junius Ponds prior to going to the Judge's residence.

Q. Okay. You lodged the charge of marijuana at the scene, is that correct?

A. That's correct.

Q. All right. And then when you got to the Judge, there was a marijuana charge and there were others, is that true?

A. That's correct.

Q. All right. Now, Officer, did you prepare any reports in connection with this?

A. I did.

Q. All right. And may I have them? Do you have them with you?

A. Yes. Do you want just the report I prepared?

Q. Everything that you have that constitutes a report or reflection of your testimony here today and last week.

THE COURT: Those reports that you made.

MR. CAMBRIA: Yes.

THE COURT: Or reports others

[9]

made based on any statement you might have made to them.

THE WITNESS: Yes. These are the rough copies that were made at the time of the arrest including a note on there as to who the owner of the vehicle is. On the back it reflects some information relative to where the car and where the cocaine was discovered.

BY MR. CAMBRIA:

Q. All right. The report reflects that you arrested the defendants for possession of marijuana, is that correct?

A. That's correct.

Q. And also the suspected cocaine, is that true?

A. That's correct.

Q. Thank you. Now, when did you make these reports, Officer?

A. The day of the arrest.

Q. All right. I'm sorry. Maybe to save some time, could you point out the date to me, the date the report is made?

THE COURT: You may approach the witness.

MR. CAMBRIA: Thank you.

THE WITNESS: (Indicating)

[10]

BY MR. CAMBRIA:

Q. Thank you. Now, are there any other reports or statements, Officer, which in anyway reflect upon the events here?

A. Yes.

Q. All right. And where are they?

A. Right here.

Q. All right.

A. These are the finished copies of the arrest report for the four subjects. These are the four arrest reports for the marijuana violation. These are the four arrest reports for the criminal possession fifth degree.

Q. All right. You said finished reports. When did you finish them?

A. I believe they were finished later on the day of the arrest and subsequently were forwarded through our station, I believe two days later. Physically I finished the reports that day, as I recall.

Q. Now, are there any other narrative, narrative reports? In other words, a recollection or a recitation of the facts by you?

A. No.

Q. So this is it?

A. Here is some other reports relative to the evidence. A

[11]

report that was made by me? This is an evidence report showing all the evidence that I had was turned over to Inves. Simbari.

Q. Would you just hand them to me, please. Now, eventually there came a point in time when one of the defendants pled guilty. Apparently pled guilty to a marijuana possession, is that correct?

A. That is correct.

Q. And that was at the scene of the Judge, is that correct?

A. That was at Judge Adam's residence where he holds court.

Q. And the individual there didn't have a lawyer, did he?

A. Pardon?

Q. Did the individual have a lawyer?

A. No, he waived his right.

Q. Excuse me, Officer. My question was: Did he have a lawyer?

A. No, he did not.

Q. All right. Thank you. What was the disposition? Strike that. Let me ask you this, Officer: What did you do with the items that you had seized? In other words, this envelope we are talking about, the roaches I think you testified about, the matters you found in the pocket of the jacket. What did you do with those items?

[12]

A. The roaches, the contents of the ashtrays from the vehicle along with one partially burned marijuana cigarette, the twenty

dollar bill containing the suspected cocaine, the plastic bag with the suspected cocaine was all turned over to Inves. Simbari at State Police, Canandaigua.

Q. What did you do with them actually from the premises? Did you put them in some kind of an envelope and transport them to the station or what?

A. When I left the vehicle en route to State Police, Junius Ponds?

Q. Yes.

A. The cocaine was left in the jacket until I got to State Police Junius Ponds.

Q. So you took the jacket with you then?

A. That's correct. It was in the vehicle.

Q. All right.

A. I don't recall whether I physically had it inside the station or not.

Q. In your vehicle?

A. Pardon?

Q. In your vehicle?

A. In my vehicle, yes.

Q. Go ahead.

[13]

A. The marijuana was placed into an envelope and transported to the State Police Junius Ponds Station where an evidence tag was made out and it was secured in another brown envelope with the evidence tag attached to it.

Q. Okay. In any event, did you ever cuff any of these four defendants?

A. No. I only had one set of handcuffs.

Q. So you just put them in your vehicle?

A. That's correct.

Q. Okay. And I suppose you got a little bonus arrest, didn't you? You had one for marijuana and then you found this other material so now you had two.

A. We don't have such a thing as a bonus arrest.

Q. You know what I mean. You had another one. You already had one and then you found another one, is that correct?

A. Yes, there was more than one arrest made.

MR. CAMBRIA: Okay. At this point, Your Honor, I have nothing further.

MR. HARVEY: No other questions.

THE COURT: Proofs are closed.

Discussion

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[14]

Mr. Cambria?

MR. CAMBRIA: Yes, Your Honor. I will attempt to be brief, Your Honor but I think under the circumstances and probably the very unique circumstances, recently I have discovered a U.S. Supreme Court case which I think covers this case. Specifically it is the United States v. Chadwick and I have a copy of it here. I'm sorry I don't have the official citation.

THE COURT: Was that the search of the trunk of the vehicle?

MR. CAMBRIA: That's right.

[15]

THE COURT: I have the citation.

MR. CAMBRIA: Thank you, Your Honor. I would like to say first of all—

THE COURT: I have also read it.

MR. CAMBRIA: The search of the car, Your Honor, I do not believe that the discovery of the so called smell and certainly we are at the officer's mercy with regard to smell, and the search of the ashtray and search of the envelope all occurred prior to the discovery of the jacket and the officer testified that he arrested these individuals—

THE COURT: Excuse me, Mr. Cambria. It's been some time since I read the Chadwick case. I think it was exigent circumstances, wasn't it?

MR. CAMBRIA: That's right.

THE COURT: Might I have a copy of the decision.

MR. CAMBRIA: That is the only one I have, Your Honor in Chadwick.

THE COURT: I will let him read

[16]

it before he responds.

MR. CAMBRIA: In Chadwick, Your Honor, the important decision, as Your Honor pointed out or the important factor is exigent circumstances. In that particular case some FBI agent had the most probable cause that probably anyone could have for searching for a drug. They had a dog, talcum powder coming out of the trunk, they had an experienced railway official telling

what they observed and there is no question that is a traditional way drugs have been shipped, talcum powder and so on. Then the FBI agent comes in. They watch individuals take the trunk, place it into the open trunk of their car, their vehicle which is outside the train station and running. At that point in time they go up and arrest the two individuals for the possession of a controlled substance based upon the tremendous showing of probable cause that they had in that case. They then take the trunk into their possession

[17]

which weighed two hundred pounds. They take it down to their facility and they then search the contents of the trunk and the issue before the Supreme Court and, in fact, all the courts as it went up is was there exigent circumstances for searching the trunk without a warrant.

Now, the government attempted to say this came within the warrantless car search exception and, therefore, they should be able to search the trunk but the U.S. Supreme Court and all the other courts that ruled on the case said that there was no exigent situation and the reason was because the men were already under arrest. There was no threat that the material would be wisked away or anything else, it was readily able to be taken into custody by the police officer as it was in that particular case and that regardless of the fact that they had much, much probable cause, the point of the matter still is there was no exigent situation because of the predicate arrest.

[18]

Now then, the court then went on to attempt to distinguish the difference between the search of a car exception and the search of a personal property located

within a car and the Supreme Court said in the car exception there is not an expectation of privacy as there would be in personal property, the reason being it's a transportation article, the things that are inside, the articles, are things that usually are in plain view. An individual inside of that car does not expect that the car itself would afford him that much personal privacy.

Now the Supreme Court has only gone one step beyond and the obvious case is Opperman v. South Dakota where they permitted the search of the glove compartment only because the ownership papers may be found in the glove compartment but both Opperman and Chadwick said that personal property stands on different footing and I might read from the Supreme Court decision

[19]

one important quote: "One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects. It travels the public thoroughfare where both the occupants and the contents are in plain view".

The court then went on:

"A person's expectation in privacy in personal luggage are substantially greater than in an automobile". The court then said: "Once the law enforcement officers have reduced the luggage or other personal property not immediately associated with the person of the arrestee, then and there they have reduced it to their exclusive control and there is no longer any chance that the arrestee might gain access to the property or seize a weapon or destroy the weapon and it is no longer within the "incident to arrest" circumstances".

Discussion

Now, in this particular case we have

[20]

no exigent situation because the officer tells us they were all under arrest for marijuana. They are people from out of town. They are on the Thruway. There is no question what is going to happen to them. They are already in custody. Then the personal property that we are talking about, the jacket, we have even a greater expectation of privacy in a jacket than you would have in a trunk. What could be more personal than the contents of someone's pocket. In this particular case we look at the jacket. We find a twenty dollar bill. That is a very personal item. We find a very personal medical card. That is a personal item. There is no question of the expectation of privacy with regard to the contents of that pocket. We don't have a two hundred pound jacket. We have a jacket which the officer tells us he takes with him to the station.

At that point in time, Your Honor, I would submit to you that the exigent

[21]

situation disappeared with regard to these personal items and then it was up to the officer to go to the magistrate and spread out before him what he has and see whether or not a warrant would be issued and here we even had a magistrate within a short period of time.

I might point out in Judge William Ringel's book which I am assuming you have on search and seizure, the 1967 supplement, he points to People v. Counterman which is a Supreme Court of Colorado decision and is cited in 556 Pacific 2nd, 41 in 1976. There the Supreme Court of Colorado held that the car exception does not apply to a

knapsack that happened to be in that vehicle and I think we certainly have the same thing here.

In Chadwick, because of the fact they were arrested the exigent situation was gone and the expectation of personal privacy was much more than the vehicle.

It was ruled to be unlawfully taken

[22]

and, Your Honor, I submit to you in the particular case here we have exactly the same thing.

THE COURT: All right. Mr. Harvey?

MR. HARVEY: I won't be long. I have another lawsuit on my mind at this time, Your Honor.

THE COURT: For the record, I am handing counsel the decision.

MR. HARVEY: Clearly this case, I don't need to read it, Your Honor I heard enough of Mr. Cambria, is distinguishable. That is the case of the People v. Belton and the circumstances are certainly distinguishable from Chadwick. This is a jacket laying in plain view on the back seat. He had every right, the officer, to execute his search, or the gathering of evidence or potential evidence at that point in time when he issued an appearance ticket or placed these people under arrest for a violation which he admits of marijuana which provides for an appearance ticket

[23]

under the law. Certainly it would be telling the officer not to do his job. This is certainly the circumstance and it is part of the vehicle. The case clearly holds it is not personal property, i.e., a two hundred pound trunk that

some individual tucked away in the vehicle but rather it was in plain view and he would be remiss, the officer, in his duties if he did not continue under the circumstances and obtain what he ultimately obtained. Under the circumstances of this case it was certainly a proper stop, a proper look around the vehicle, certainly he smelled something, and an all together proper warrantless search in this particular case.

MR. CAMBRIA: Your Honor, I may say one thing. It was certainly in plain view. In Chadwick the trunk of the car is open and the trunk is sitting there and the motor running.

THE COURT: Yes. How do you distinguish the fact the search was made

[24]

at headquarters some two hours after it was taken into custody in Chadwick.

MR. CAMBRIA: Your Honor, I think—

THE COURT: As I recall Chadwick, that was the circumstance, was it not?

MR. CAMBRIA: It was about an hour, hour and a half.

THE COURT: He wasn't going to go anyplace weighed down with two hundred pounds there in the station house, he could have gotten a warrant.

MR. CAMBRIA: Yes.

THE COURT: That is the point that catches my interest.

MR. CAMBRIA: With regard to this, Your Honor, we take the decision, we see that interest as the telling factor as far as the Supreme Court is concerned. It's the ex-

pectation of privacy in the article and whether or not an exigent situation exists. In this particular situation it seems to me it's just as easy to take that jacket. In fact, easier to take this into

[25]

exclusive custody in taking the people downtown making an issue of privacy and exigent situation. Those are the things.

THE COURT: We have bifurcated this hearing so I might be wrong on the facts and if so, correct me. There was a search and discovery of cocaine occurring on the road when the car was stopped, is that not correct?

MR. CAMBRIA: Yes.

THE COURT: Obviously you researched the case and I compliment you on it because it certainly is a help to the court.

Are you also familiar with Daggie against the State an Alaska Supreme Court case where a car was stopped after a high speed chase and marijuana was in plain view and they held that the seizure of a paper bag in the back seat was okay because it was made contemporaneously with the arrest even though the driver was out of the car while the arrest was being made.

[26]

The court in that case said a search could extend only to the visible area within easy presence of the suspect, not closed places or closed containers which seems to me to be a distinction which might be applicable as against Chadwick.

MR. CAMBRIA: I am not familiar with it, Your Honor. I would like the opportunity to read and be able to

respond. It seems to me we are talking about personal property as opposed to paper bags. It's still a distinction as far as privacy. Frankly, I don't know the rest of the facts in the case.

THE COURT: I am in a bind for time. I am prepared to decide the motion. If you find something that would justify a re-argument, I will certainly be liberal.

Findings and Conclusions

I make the following findings of fact beyond a reasonable doubt and arrive at the following conclusions of law.

I find that the state policeman, Douglas Nicot, was on duty on April 9, 1978

[27]

and he noticed coming from behind him a late model Chrysler automobile being operated at a high rate of speed. He waited for it to come abreast of him and then he pulled to the right and watched it pass and clocked the vehicle doing seventy-five miles per hour in a fifty-five mile an hour speed zone.

He at that time was driving an unmarked car. He followed the vehicle and he stopped it.

He caused the driver to produce the registration and caused him to get out. He ordered the others to get out. He patted them down and found nothing as a result of the pat down.

During the procedure he noticed the smell of burned marijuana.

His subsequent search of the vehicle showed roaches, marijuana residue and partially burned cigarettes in the ashtray. He saw on the floor of the vehicle in plain view an envelope marked "Supergold" which by his past training and experience indicated

[28]

an envelope usually and customarily used for the possession of marijuana.

They were arrested for possession of marijuana.

He observed a jacket laying inside the seat which contained eight pockets, two of them were zippered.

In one of the pockets he found a card which identified the jacket as belonging to the defendant in this case, Mr. Belton.

In one zippered closed pocket not visible without his having taken the jacket in his hand and without having unzippered the pocket, he found the twenty dollar bill rolled up in which was a substance which he had grounds reasonably to believe was cocaine and later, for the purposes of this hearing, was established to be cocaine. Also a small glassine envelope, plastic which contained similar powder and he took that into his possession.

I find that because of the speed he had reasonable cause. This is distinguished

[29]

from People against Engel which was a routine traffic check. This was a car that was speeding at a high rate of speed. He had reasonable cause to stop. He had reasonable cause when he smelt the marijuana to get them out and take them under arrest.

Findings and Conclusions

I find that Chadwick should be, at least with a line of cases, restricted to the circumstances. There the police had possession of the trunk. It was a large bulky object. It was in the station house. The defendants were in custody and they weren't going anyplace. Here a single policeman in a rural area was in the presence of four defendants, four men. What would or would not have happened to the jacket, whether it would be carried to the police station by one of the individuals?

There is, of course, no evidence in this case from which I could find there was cause to pat down the jacket for a weapon, there being absolutely no proof in the case that was so.

[30]

Following the decision of the Alaska Supreme Court in Daggie v. the State of Alaska, 14 criminal law reports 2131, I find that there were exigent circumstances and that the officer was authorized to search the jacket. Even though its owner was outside and under arrest it was in open view and it was not in a closed space or in any closed opening and the fact that the pockets of the jacket were zippered does not remove the case from the exigent circumstance exception to search and seizure.

You may have an exception to every one of the findings of facts and conclusions of law that the court has just made.

If you wish to re-argue after having read Daggie, I will assure you I will be liberal in granting that.

MR. CAMBRIA: Thank you.

• • •

Order Denying Suppression,
Filed September 29, 1978

(SAME TITLE)

PRESENT: HON. GEORGE REED, Judge

The defendant having moved this Court for an Order suppressing evidence, and any information obtained therefrom and suppressing the use of said evidence upon the trial of the above named defendant, and the issues raised by said motion having been duly heard and tried before this Court on the 26th day of July, 1978, and the 2nd day of August, 1978,

NOW, on reading and filing the notice of motion dated June 30, 1978, and the affidavit of Paul J. Cambria, Jr. sworn to on the same date, and the affidavit of Roger Belton sworn to on the 1st day of July, 1978, with proof of service thereof on behalf of the defendant, in support of the motion, and the affidavit of District Attorney James Harvey, sworn to on the 17th day of July, 1978, in opposition thereto and on all the evidence adduced before the Court on the trial of the issues raised by said motion on the above referenced dates, and due consideration having been had and the Court having rendered its decision on the record, orally, on August 2, 1978, it is

ORDERED, that the said motion be denied.

/s/HON. GEORGE REED
Hon. George Reed, Judge
Ontario County Court

ENTER:

Notice of Appeal, Filed September 29, 1978

(SAME TITLE)

SIRS:

PLEASE TAKE NOTICE that the defendant ROGER BELTON, hereby appeals to the Supreme Court of the State of New York, Appellate Division, Fourth Judicial Department, from a judgment of conviction of the County Court of Ontario County rendered on the 29th day of September, 1978, convicting the said defendant of attempted criminal possession of a controlled substance in the sixth degree (§§110.00, 220.06 of the New York State Penal Law), and from the sentence therein imposed on the same date, and from each and every part of said judgment and sentence, and from each and every intermediate order therein made, most particularly the order of this Court denying suppression of evidence entered August 2, 1978.

DATED: Buffalo, New York
September 26, 1978

Yours, etc.

LIPSITZ, GREEN, FAHRINGER,
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TO: JAMES HARVEY, ESQ.
District Attorney of Ontario County
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Judgment of the New York Supreme Court, Appellate Division, Fourth Department, Filed May 22, 1979

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

PRESENT: DILLON, P.J., CARDAMONE, SCHNEPP, DOERR, MOULE, JJ.

People of the State of New York,

Respondent,

vs.

Roger Belton,

Appellant.

The above named Roger Belton, defendant in this action, having appealed to this Court from a judgment of the Ontario County Court, entered in the Ontario County Clerk's office on September 29, 1978 and said appeal having been argued by Paul Cambria of counsel for appellant, Timothy Buckley of counsel for respondent, and due deliberation having been had thereon,

It is hereby ORDERED, That the judgment so appealed from be, and the same hereby is unanimously affirmed.

Opinion by Moule, J., which is hereby made a part hereof.

Entered: May 22, 1979

MARY F. ZOLLER, *Clerk*

Opinion of the New York Supreme Court, Appellate Division, Fourth Department, Filed May 22, 1979

The People of the State of New York, Respondent, v Roger Belton, Appellant.

Fourth Department, May 22, 1979

SUMMARY

Appeal from a judgment of the Ontario County Court (Harold Stiles, J.), rendered September 29, 1978, convicting defendant, upon his plea of guilty, of attempted criminal possession of a controlled substance in the sixth degree.

APPEARANCES OF COUNSEL

Lipsitz, Green, Fahringer, Roll, Schuller & James (Paul J. Cambria, Jr., of counsel), for appellant.

James R. Harvey, District Attorney (Timothy Buckley of counsel), for respondent.

OPINION OF THE COURT

On this appeal defendant contends that the trial court erred in denying his motion to suppress cocaine found in his jacket which was searched without a warrant in the rear seat of an automobile from which defendant had exited in order to be arrested for possession of marihuana. On April 9, 1978 a State Police officer observed an automobile with four passengers traveling 75 miles per hour on the New York State Thruway. Upon stopping the auto and questioning the driver, the officer smelled the odor of marihuana coming from within the auto and observed on the floor of the auto an envelope stamped "Supergold" which he recognized as a type of envelope that is

commonly used to sell marihuana. The officer ordered the occupants from the auto and patted each down. He then removed the "Supergold" envelope from the auto and, when he found that it contained traces of marihuana, he arrested the four for possession of marihuana, read them their rights and searched them. The officer then searched the passenger compartment of the auto and seized marihuana cigarette butts which he observed in the ashtrays. He also searched five jackets that he found in the back seat and, in one of them, he found cocaine and defendant's identification. The officer then arrested the four for possession of cocaine.

On May 24, 1978 the Ontario County Grand Jury indicted defendant for criminal possession of a controlled substance in the fifth degree. Defendant pleaded guilty to attempted possession of a criminal substance in the sixth degree following the Ontario County Court's denial of his motion to suppress the cocaine.

Defendant contends that the warrantless search of his jacket violated his constitutional rights. The cornerstone of any Fourth Amendment inquiry is reasonableness and a warrantless search must come within one of the "specifically established and well-delineated exceptions" to the warrant requirement *(Katz v United States,* 389 US 347, 357). The exceptions are (1) a consensual search; (2) seizure of evidence and contraband in plain view; (3) search and seizure incidental to a lawful arrest; (4) search and seizure based upon probable cause, and, applicable to automobile searches; (5) a search in exigent circumstances where there exists probable cause *(People v Mahoney,* 60 AD2d 107, 109-110). Inasmuch as defendant does not challenge the lawfulness of either the initial stop or the arrest for possession of marihuana, the narrow question on this appeal is whether the search of defendant's jacket in the back seat of the vehicle can be justified under one of the above exceptions.

Opinion of the New York Supreme Court, Appellate Division, Fourth Department, Filed May 22, 1979

The People contend that the search was justified as a search incident to arrest and we agree. Upon a lawful arrest, a search may be made of the person of the arrestee and of the area within the arrestee's control *(United States v Robinson,* 414 US 218, 224; *Chimel v California,* 395 US 752, 763). This area includes those personal effects of the arrestee that are "ready to hand" *(People v Weintraub,* 35 NY2d 351, 354). Warrantless searches incident to arrest are justified by the officer's need to find weapons and easily destructible evidence within the arrestee's immediate area *(United States v Robinson, supra; Chimel v California, supra).* Such searches are also allowed so that an officer can discover the fruits of the crime, the instrumentalities used to commit the crime and contraband *(People v Lewis,* 26 NY2d 547, 550-551).

Defendant contends that *United States v Chadwick* (433 US 1) mandates suppression of the cocaine. In that case the United States Supreme Court held unreasonable as a search incident to arrest the search of a footlocker seized from an automobile upon the defendant's arrest and searched one and one-half hours later at a police station. In *People v De Santis* (46 NY2d 82) the Court of Appeals interpreted *Chadwick* narrowly and allowed, as a search incident to arrest, the search of a suitcase in defendant's possession at the time of arrest. The court found the search reasonable because it had a close nexus to the time and place of the arrest *(People v De Santis, supra).* The court noted that "the practical impetus for allowing these searches lies in the fact that the arrest itself constitutes such a major intrusion into the privacy of the individual that the encroachment caused by a contemporaneous search of the arrestee and his possessions at hand is in reality *de minimis" (People v De Santis, supra,* p 87, citing *People v Perel,* 34 NY2d 462, 467-468; see, also, *United States v Ochs,* 595 F2d 1247).

Opinion of the New York Supreme Court,
Appellate Division, Fourth Department,
Filed May 22, 1979

In *People v Cofield* (55 AD2d 113, affd 43 NY2d 654), the First Department found reasonable as a search incident to arrest the search of a paper bag within a satchel on the back seat of defendant's auto while defendant stood outside the auto. Also, in *People v Abramowitz* (58 AD2d 921), the Third Department allowed as a search incident to arrest the search of a leather bag behind the driver's seat of a vehicle after the driver had been arrested for driving while impaired and after pills were found during a search of his person (see, also, *People v Sauger*, 58 AD2d 919; *People v Mangan*, 55 AD2d 247, 249).

The officer's search of defendant's jacket which he found in the vehicle did not exceed constitutional limits. The search was reasonable in scope, intensity and duration. Once defendant was validly arrested for possession of marihuana, the officer was justified in searching the immediate area for other contraband.

The judgment should be affirmed.

Dillon, P.J., Cardamone, Schnepp and Doerr, JJ., concur.

Judgment unanimously affirmed.

Order of the New York Court of Appeals Granting Leave to Appeal and Fixing Bail, Filed June 27, 1979

STATE OF NEW YORK
COURT OF APPEALS

BEFORE: HON. MATTHEW J. JASEN, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK

Respondent,

against

ROGER BELTON,

Appellant.

I, MATTHEW J. JASEN, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that in the record and proceedings herein* questions of law are involved which ought to be reviewed by the Court of Appeals and pursuant to CPL 460.20 it is

ORDERED that permission be, and it hereby is, granted to the above named appellant to appeal to the Court of Appeals; and notice having been given pursuant to CPL 460.60(2), it is further

ORDERED that, pursuant to CPL article 520, the defendant be continued on bail in the sum of $750.00, as at present provided.

Dated at Buffalo, New York
June 27, 1979.

/s/ MATTHEW J. JASEN
Associate Judge

*Description of Order:
Order of Apellate Division, Fourth Department, entered May 22, 1979, affirming Ontario County Court judgment entered September 29, 1978.

Notice: This stay will terminate if the appeal has not been argued or submitted within 120 days (CPL 460.60[3]).

Judgment of the New York Court of Appeals,
Filed June 5, 1980

ORDER OF THE NEW YORK COURT OF APPEALS

Remittitur

COURT OF APPEALS
STATE OF NEW YORK
The Hon. Lawrence H. Cooke, Chief Judge, Presiding

4 No. 208

The People &c.,

Respondent,

v.

Roger Belton,

Appellant.

The appellant in the above entitled appeal appeared by Lipsitz, Green, Fahringer, Roll, Schuller & James; *the respondent appeared by* James R. Harvey.

The Court, after due deliberation, orders and adjudges that the order is reversed, motion to suppress granted and indictment dismissed. Opinion by Cooke, Ch.J. All concur except Gabrielli, J., who dissents and votes to affirm in an opinion in which Jasen, J., concurs.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the County Court, Ontario County, *there to be proceeded upon according to law.*

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

/s/ JOSEPH W. BELLACOSA
Joseph W. Bellacosa, Clerk of the Court

Court of Appeals, Clerk's Office, Albany, June 5, 1980.

Opinion of the New York Court of Appeals, Filed June 5, 1980

The People of the State of New York, Respondent, v Roger Belton, Appellant.

Argued April 21, 1980; decided June 5, 1980

SUMMARY

Appeal, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department, entered May 22, 1979, which affirmed a judgment of the Ontario County Court (Harold Stiles, J.), convicting defendant, upon his plea of guilty, of attempted criminal possession of a controlled substance in the sixth degree.

On April 9, 1978, defendant and three companions were traveling on the New York State Thruway in Ontario County when their car was stopped by a State trooper for speeding. Upon approaching the vehicle, the officer smelled the distinct odor of marihuana emanating from within and observed on the floor an envelope which he recognized as a type that is commonly used to sell the substance. At that point, the officer ordered the occupants out of the vehicle, patted each down, removed the envelope from the floor and ascertained that it contained a small amount of marihuana. After the marihuana was found, the individuals, still standing outside the car, were placed under arrest. The officer then re-entered the vehicle, searched the passenger compartment and seized the marihuana cigarette butts lying in the ashtrays. He also rifled through the pockets of five jackets on the back seat. Upon opening the zippered pocket of one of them, he discovered a small amount of cocaine and defendant's identification. Following denial of his motion to suppress the cocaine, defendant pleaded guilty to attempted possession of a criminal substance in the sixth degree. A unanimous Appellate Division affirmed, holding that the warrantless search of the jacket was lawful as incident to defendant's arrest for possession of marihuana.

Opinion of the New York Court of Appeals,
Filed June 5, 1980

The Court of Appeals reversed, granted the motion to suppress and dismissed the indictment, holding, in an opinion by Chief Judge Cooke, that, following a lawful arrest, the privacy interest of the arrestee in an article remains intact once he is effectively neutralized or the article is within the exclusive control of the police, at which point any exigency which would otherwise have justified a warrantless search has been dissipated and the search is no longer incident to the arrest.

OPINION OF THE COURT

Chief Judge Cooke.

A warrantless search of the zippered pockets of an unaccessible jacket may not be upheld as a search incident to a lawful arrest where there is no longer any danger that the arrestee or a confederate might gain access to the article.

On April 9, 1978, defendant and three companions were traveling on the New York State Thruway in Ontario County when their car was stopped by a State trooper for speeding. Upon approaching the vehicle, the officer smelled the distinct odor of marihuana emanating from within and observed on the floor an envelope which he recognized as a type that is commonly used to sell the substance. At that point the officer ordered the occupants out of the vehicle, patted each down, removed the envelope from the floor and ascertained that it contained a small amount of marihuana.

After the marihuana was found, the individuals, still standing outside the car, were placed under arrest. The officer then reentered the vehicle, searched the passenger compartment and seized the marihuana cigarette butts lying in the ashtrays. He also rifled through the pockets of five jackets on the back seat. Upon opening the zippered pocket of one of them, he discovered a small amount of cocaine and defendant's identification.

Opinion of the New York Court of Appeals,
Filed June 5, 1980

Following denial of his motion to suppress the cocaine, defendant pleaded guilty to attempted possession of a criminal substance in the sixth degree. A unanimous Appellate Division affirmed, holding the warrantless search of the jacket lawful as incident to defendant's arrest for possession of marihuana (68 AD2d 198). There should be a reversal.

Analysis begins with the general proposition that, except in a few narrowly circumscribed instances, the Fourth Amendment condemns warrantless searches and seizures as unreasonable *(Coolidge v New Hampshire,* 403 US 443, 455). The privacy interest of our citizens is far too cherished a right to be entrusted to the discretion of the officer in the field. Reasonableness of the intrusion does not turn upon the belief, however well founded it may be, that the article sought is concealed in a particular place. The Constitution, therefore, focuses upon the desirability of having the judiciary, rather than the police, determine when searches and seizures are permissible and the limitations that are to be placed upon such activities. Necessarily, then, the predicate for the warrantless search must be carefully examined to ensure that its scope, both temporally and geographically, did not exceed constitutional limits.

The People maintain that the warrantless search of defendant's jacket was reasonable on the ground that it was incident to his lawful arrest. A custodial arrest of a suspect based upon probable cause without a warrant in a public place constitutes a reasonable intrusion under the Fourth Amendment *(United States v Watson,* 423 US 411). That arrest being a lawful and substantial intrusion, any search incident thereto requires no additional justification *(People v Perel,* 34 NY2d 462; see, also, *People v Weintraub,* 35 NY2d 351).

When a suspect is placed under custodial arrest, there is always present the danger that he may seek to use a weapon to

effect an escape or destroy or conceal evidence of a crime. Thus, to safeguard himself and others, and to prevent the loss of critical evidence, it is reasonable from a Fourth Amendment perspective for the arresting officer to conduct a prompt, warrantless "search of the arrestee's person and the area 'within his immediate control' — construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence" *(Chimel v California,* 395 US 752, 763). Upon arrest, the privacy interest of the arrestee in possessions within the arrestee's immediate control are subsumed within the State's interest in discovering weapons, thwarting access to means of escape and preventing the destruction of evidence (see *United States v Robinson,* 414 US 218). But while the arrest establishes the authority for the warrantless search, it does not transform the initial predicate into carte blanche justification to rummage through all articles which might bear some connection to the arrestee (see *Dyke v Taylor Implement Co.,* 391 US 216; People v Williams, 37 NY2d 206; *People v Lewis,* 26 NY2d 547).

The privacy interest of the arrestee in an object remains intact once he is effectively neutralized or the object is within the exclusive control of the police (see *Arkansas v Sanders,* 442 US 753; *United States v Chadwick,* 433 US 1). At that point, any exigency which would otherwise have justified a warrantless search has been dissipated and the search is no longer an incident to the arrest (but cf. *People v De Santis,* 46 NY2d 82; *People v Darden,* 34 NY2d 177).[1] The critical inquiry focuses upon the extent to which the arrestee may gain access to the property rather than the time or space between the arrest and search (see *United States v Edwards,* 415 US 800).

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[1]To the extent that these cases may be read to suggest otherwise, they are disapproved.

In this regard, *United States v Chadwick* (433 US 1, *supra*) is instructive. There, railroad officials in San Diego observed two individuals loading a heavy footlocker onto a train bound for Boston. Their suspicions were aroused when the trunk leaked talcum powder, a substance commonly used to mask the odor of marihuana. The officials notified Federal agents who relayed the information to their counterparts in Boston. When the train arrived in that city, the two individuals who had loaded the footlocker in San Diego were on hand and lifted it into the trunk of Chadwick's waiting car. At that point, Federal agents arrested all three, seized the footlocker and transported them to the Federal building. There, with the arrestees safely incarcerated, the agents opened the trunk and seized a large quantity of marihuana. In holding the search unlawful, the court rejected the notion that it was incidental to Chadwick's arrest. Said the Court: "Once law enforcement officers have reduced luggage or other personal property not immediately associated with the person of the arrestee to their exclusive control, and there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer an incident of the arrest" (433 US, at p 15; see, also, *Arkansas v Sanders*, 442 US 753, *supra*).

That defendant retained an expectation of privacy in the contents of his jacket pockets notwithstanding the fact of his arrest is beyond dispute. Indeed, it is difficult to imagine a more private receptacle where one might place one's most personal items than the zippered recesses of a jacket. Defendant's arrest, standing alone, did not vitiate that privacy interest by being converted into a license for law enforcement authorities to engage in a warrantless search of unlimited temporal and geographic scope. Once defendant had been removed from the automobile and placed under arrest, a search of the interiors of a private receptacle safely within the exclusive custody and

control of the police may not be upheld as incident to his arrest *(United States v Chadwick,* 433 US 1, *supra; Arkansas v Sanders,* 442 US 753, *supra).* The car was in a secure place where it could have been easily guarded, its occupants under arrest and safely away from the vehicle, their removal to the police station imminent.[2] There was, therefore, no reason why the search should not have awaited the issuance of a warrant.

Accordingly, the order of the Appellate Division should be reversed, the motion to suppress granted and the indictment dismissed.

Gabrielli, J. (dissenting). I respectfully dissent. Although I am in agreement with the standard legal principles enunciated by the majority, I cannot concur in what appears to be an obvious misapplication of those principles to the facts of this case.

A warrantless search based on probable cause is permissible if the facts underlying the search bring it within any of several narrow exceptions to the warrant requirement with which this court is fully familiar. One such exception to the warrant requirement is a search incident to a lawful arrest. Although this particular exception has had a somewhat uncertain history (compare *Trupiano v United States,* 334 US 699, with *United States v Rabinowitz,* 339 US 56), it is now well settled and cannot be disputed that a police officer making a valid arrest may legitimately engage in a limited search of both the person of

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[2]One searches the record in vain for support of the dissenter's claim that at the time of arrest—the point from which the predicate for the warrantless search is measured—"the jackets were within reach of the four suspects and had not yet been reduced to the exclusive control of the officer" (dissenting opn, p 454). Indeed, the facts, as found at the suppression hearing and affirmed by the Appellate Division, were to the effect that the jacket was searched after the defendant was removed from the vehicle and then placed under arrest.

the arrestee and "the area from within which he might gain possession of a weapon or destructible evidence" *(Chimel v California,* 395 US 752, 763) without first obtaining a search warrant. Moreover, although the general rationale for permitting warrantless searches under certain circumstances is the need to allow a police officer sufficient flexibility to protect himself from possible danger and to prevent the destruction of evidence (see, generally, *Arkansas v Sanders,* 442 US 753, 759), a warrantless search incident to a lawful arrest may be made "whether or not there is probable cause to believe that the person arrested may have a weapon or is about to destroy evidence" *(United States v Chadwick,* 433 US 1, 14).

To be sure, such a search is subject, as it should be, to careful judiciary scrutiny before its fruits may be admitted into evidence. As the Supreme Court has recently stated, "warrantless searches of luggage or other property seized at the time of an arrest cannot be justified as incident to that arrest either if the 'search is remote in time or place from the arrest' * * * or no exigency exists. Once law enforcement officers have reduced luggage or other personal property not immediately associated with the person of the arrestee to their exclusive control, and there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer an incident of the arrest" *(United States v Chadwick, supra,* at p 15). While these principles are readily articulated, their application to individual cases may seem, at first blush, to be a task of some complexity. This is so in large part because each case must turn upon its peculiar facts and "an apparently small difference in the factual situation frequently is viewed as a controlling difference in determining Fourth Amendment rights" *(Arkansas v Sanders,* 442 US 753, 757, *supra).* This observation is particularly apt when applied to a case such as this, in which all members of the

court are agreed that the validity of the challenged search turns upon the degree to which the defendant and his property had come within the exclusive control of the police at the time of the search. Clearly, we are here presented with a valid arrest based upon probable cause. This is, as it must be, conceded by all. Moreover, there exists no dispute but that the officer's search of the persons of the defendant and his companions and the initial search of the car for contraband were entirely proper. The only issue that divides this court, then, is whether the officer acted illegally by extending his search to include the pockets of the jackets thrown on the back seat of the automobile. The courts below, which by law, unlike this court, are empowered to resolve disputes of fact, have concluded that the jackets were within reach of the four suspects and had not yet been reduced to the exclusive control of the officer. I find no justification for disturbing this essentially factual determination and, based upon this finding, the conclusion that the search was incidental to a lawful arrest cannot be avoided.

Certainly there exists sufficient evidence in the record before us to support the factual findings made by the courts below. Indeed, this case is illustrative of the type of situation in which a warrantless search is most appropriate. We are not here faced with an extended search of a defendant's property after the defendant has been completely subdued and all actual danger has passed. Rather, this search was conducted by a lone peace officer who was in the process of arresting four unknown individuals whom he had stopped in a speeding car owned by none of them and apparently containing an uncertain quantity of a controlled substance. The suspects were standing by the side of the car as the officer gave it a quick check to confirm his suspicions before attempting to transport them to police headquarters or radioing for assistance. The situation was still fluid, and neither the suspects themselves nor their property had as

yet been reduced to the exclusive and certain control of the police. I cannot agree that under these circumstances the officer acted improperly in searching the jackets found on the back seat of the automobile. The potential for danger to the officer or for the destruction of evidence is patent, and thus the search must be deemed incidental to the arrest.

I must confess that I am somewhat puzzled by the rationale adopted by the majority of this court today, for it appears rather ingenuous. Instead of undertaking that careful factual analysis of the realities underlying the continuing encounter between the lone officer and the four suspects which is so necessary to fairly judge the reasonableness of the officer's actions, the court premises its decision completely upon an uncertain assumption drawn from two isolated facts. Apparently the majority believes that since the suspects were standing outside the car at the time of the search and had been told that they were under arrest, both their persons and their property had thereby been conclusively and safely reduced to the complete control of the officer, as a matter of law. Although one might well wish that all criminal suspects could so readily be subdued as a matter of law, I cannot agree with a decision that requires a police officer to stake his very life upon the validity of such a questionable presumption.

Accordingly, I vote to affirm the order appealed from.

Judges Jones, Wachtler, Fuchsberg and Meyer concur with Chief Judge Cooke; Judge Gabrielli dissents and votes to affirm in a separate opinion in which Judge Jasen concurs.

Order reversed, etc.

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-328

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

vs.

ROGER BELTON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE NEW YORK STATE COURT OF APPEALS

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respondent ROGER BELTON moves the Court for an order permitting him to proceed in this Court in forma pauperis, with his response to the petition for a writ of certiorari to the Court of Appeals of the State of New York, which judgment was entered on June 5, 1980, pursuant to the provisions of Title 28, United States Code, Section 1915, and Rule 46 of the Rules of this Court, and in support thereof attaches the affidavit of said respondent.

Respondent's brief in opposition to the petition for a writ of certiorari is being filed with this motion and respondent's affidavit.

LIPSITZ, GREEN, FAHRINGER,
ROLL, SCHULLER & JAMES
PAUL J. CAMBRIA, JR., ESQ.
Attorney for Respondent
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To:

JAMES R. HARVEY, ESQ.
District Attorney, Ontario County
Attorney for Petitioner
Ontario County Courthouse
Canandaigua, New York 14424

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-328

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

vs.

ROGER BELTON,

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

STATE OF NEW YORK)
COUNTY OF ERIE) SS.
CITY OF BUFFALO)

1. I, ROGER BELTON, being first duly sworn, depose and say that I am the respondent in the above entitled case; that in support of my motion to proceed in response to the petition for a writ of certiorari filed by the Ontario County (New York) District Attorney's office without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding, including the printing of the attached brief in opposition to the petition for writ of certiorari; that I believe that I am entitled to so respond to this petition for a writ of certiorari.

2. I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of responding to the petition are true.

(a) I am not presently employed, having been laid off from my job at the Durez Division of Hooker Chemical Company in December, 1978. My monthly income from that job was approximately $1,000 (I worked there less than one year). I am

receiving public assistance.

(b) I have not received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source.

(c) The total value of my cash, checking, and savings accounts is $.00.

(d) I do not own any real estate, stocks, bonds, notes, automobiles or other valuable property.

(e) My wife Karen is dependent upon me for support.

3. On or about October 8, 1979 I moved in the New York Court of Appeals for an order permitting me to maintain my appeal as a poor person and file seven (7) copies of the record on appeal and seven (7) copies of the brief instead of the twenty (20) copies required by the Rules of that Court. On October 23, 1979 the Court of Appeals granted my motion and ordered that my appeal could be prosecuted upon ten (10) copies each of the record on appeal and the brief. These papers were reproduced in the least expensive way possible.

4. I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

Roger Belton
ROGER BELTON

Sworn to before me this
25th day of September, 1980.

Marie LaRue

[illegible] 81

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-328

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

vs.

ROGER BELTON,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

LIPSITZ, GREEN, FAHRINGER,
ROLL, SCHULLER & JAMES
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-328

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

vs.

ROGER BELTON,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

Respondent ROGER BELTON prays that a writ of certiorari to review the judgment of the New York Court of Appeals entered on June 5, 1980 be denied.

Opinion Below

The opinion of the New York Court of Appeals dated June 5, 1980 is reported at 50 N.Y.2d 447 (1980) and is printed in the Appendix to the petition at p. A-1 et seq. The opinion of the Appellate Division, Fourth Judicial Department, which was reversed by the Court of Appeals decision, is found at 68 A.D.2d 198 (4th Dept. 1978) and is reprinted in the Appendix at p. A-13 et seq.

Jurisdiction

Following the denial of respondent's motion to suppress, he pleaded guilty on September 29, 1978 in the Ontario County (New York) Court to attempted criminal possession of a controlled substance in the sixth degree in violations of Sections 110.00 and 220.06 of the New York Penal Law.

Respondent appealed as of right (New York Criminal Procedure Law § 710.70[2]) to the Appellate Division, Fourth Judicial Department. On May 22, 1979 that court unanimously affirmed the conviction. An application for leave to appeal to the New York Court of Appeals was granted by the Honorable Matthew J. Jasen, an Associate Judge of the Court of Appeals. On June 5, 1980 that court reversed the order of the Appellate Division, granted the motion to suppress, and dismissed the indictment.

A petition for a writ of certiorari was served upon respondent on August 30, 1980. The jurisdiction of this Court was invoked under 28 U.S.C. § 1257(3). This brief in opposition to the petition is filed within thirty days after receipt of the petition, pursuant to Rule 22(1) of the Supreme Court Rules.

Constitutional Provisions Involved

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statute Involved

New York Criminal Procedure Law § 710.70(2) Motion to suppress evidence; orders of suppression; effects of orders and of failure to make motion.

An order finally denying a motion to suppress evidence may be reviewed upon an appeal from an ensuing judgment of conviction notwithstanding the fact that such judgment is entered upon a plea of guilty.

Question Presented

1. Whether the warrantless search of respondent's zippered jacket in the absence of exigent circumstances while it was within the exclusive control of the police, and the seizure of contraband from its recesses violates the Fourth and Fourteenth Amendments, requiring that the evidence be suppressed and the indictment dismissed.

Statement of Facts

On April 9, 1978, respondent and three companions, all of whom were from Buffalo, were travelling west on the New York State Thruway. A State Trooper, Douglas Nicot, estimated the vehicle was travelling at approximately 75 miles per hour in 55 mile per hour zone and accordingly motioned the automobile over to the shoulder of the road to arrest the driver for a speeding violation. The driver rolled down his window and complied with the trooper's request for his license and registration. Upon examining the registration, the trooper discovered that the car was not owned by any of the four individuals but was registered to an unrelated woman in Buffalo, and the license produced by the driver was not his own. Respondent was seated in the rear seat behind the driver.

Having smelled the odor of burning marijuana emanating from inside the stopped vehicle, the trooper concluded that the individuals were unlawfully in possession of marijuana and placed them under arrest and commanded them to exit from the car. As the four men got out of the vehicle, the officer placed them a short distance apart from each other and conducted a pat down search for weapons. Even though the defendants were in custody and the officer was assured as the result of his search that he had no reason to fear any physical violence through the use of a concealed weapon, he entered the car and conducted a further search. He seized a manilla envelope, stamped "super gold", from the floor of the vehicle. A minute quantity of marijuana residue was found inside.

After some butted marijuana cigarettes were discovered in the ashtray, the trooper formally arrested the defendants, read them their Miranda rights, and again searched each of them thoroughly for further evidence. Despite the fact that "[t]he car was in a secure place where it could have been easily guarded, its occupants under arrest and safely away from the vehicle, their removal to the police station imminent" (50 N.Y.2d at 452), the trooper re-entered the dormant vehicle and conducted a further intensive search of its contents, particularly an item of personal clothing found on the back seat.

Lying in the middle of the back seat was a black leather jacket with four or six pockets. None of the defendants was within any reach of the jacket nor was there any indication that this personal item of clothing contained a concealed weapon. The trooper conducted a pat down search of the jacket and felt no dangerous instrument hidden inside. Holding the jacket in one hand and thus reducing it to his exclusive possession, he nevertheless

unzipped and/or opened all of the pockets. In one of the recesses was found two marijuana cigarettes. In a zippered pocket the trooper discovered a twenty dollar bill which, when unfolded, yielded a small quantity of white powder. The warrantless examination of the jacket also produced a plastic bag containing white powder. In one of the pockets was a personal medical insurance card bearing respondent's name. None of these seized items was visible until the trooper opened the pockets. Throughout this entire illegal search and seizure, the defendants were outside of the vehicle, unarmed and within the control and custody of an armed and trained New York State trooper. Based upon his findings, Trooper Nicot arrested all four defendants for illegal possession of suspected cocaine. He radioed to the nearest state trooper barracks and requested that a magistrate be made immediately available for the arraignment. At no time in the trial court during the suppression hearing was there ever a claim by the trooper that his own personal safety was in jeopardy or that the defendants had been anything other than fully cooperative.

The four defendants and the jacket were swiftly transported to a town court and brought before a local town justice. Respondent was subsequently indicted on May 24, 1978 for criminal possession of a controlled substance in the fifth degree. No indictments were returned against his three companions. Upon the trial court's denial of respondent's motion to suppress the cocaine seized during the illegal search, respondent pleaded guilty to attempted criminal possession of a controlled substance in the sixth degree in violation of New York Penal Law.

An appeal was mounted to the Appellate Division, Fourth Judicial Department. On May 22, 1979 that court affirmed respondent's conviction and incorrectly held that the search of the

jacket found in the vehicle's back seat, outside of the reach of respondent or his companions, was justified as a search incident to arrest. On June 27, 1979 respondent's application for leave to appeal was granted by an associate judge of the New York Court of Appeals. In its opinion dated June 5, 1980 New York's court of last resort held that: "A warrantless search of the zippered pockets of an unaccessible jacket may not be upheld as a search incident to a lawful arrest where there is no longer any danger that the arrestee or a confederate might gain access to the article" (A-5 of petition).

REASONS FOR DENYING THE WRIT

I

The warrantless search of respondent's zippered jacket in the absence of exigent circumstances while it was in the exclusive control of the police, and the seizure of contraband from its recesses violates the Fourth and Fourteenth Amendments, as properly found by New York State's highest court.

Petitioner maintains that the decision of the New York Court of Appeals is "in complete disharmony with the decisions of federal Courts of Appeals and state courts of last resort that have been confronted by similar factual situations" (Petition at 5). On the contrary, we are convinced that the Court of Appeals properly applied the rules governing a search incident to arrest and found that the search in the present case went beyond that which this Court has found permissible and went outside of the boundaries established by this Court in Chimel v. California, 395 U.S. 752 (1969). Furthermore, the New York court was guided in its decision by the principles set forth in United States v. Chadwick, 433 U.S. 1 (1977) and Arkansas v. Sanders, 442 U.S. 753 (1979). Moreover, even a cursory review of the cases relied upon by petitioner in

which warrantless searches were upheld indicates that the factual situations are widely disparate.

Finally, petitioner would have this Court grant certiorari and reverse the order of the New York Court of Appeals based solely upon unsupported speculation that the arresting officer was in danger. There was no such finding in the trial court and thus petitioner is precluded from arguing facts which simply do not exist on the record of this case. Petitioner claims that the decision of the New York Court of Appeals in People v. Belton has caused "acute difficulties in advising police officers as to the limit of their legal authority under such circumstances" (Petition at 8). We respectfully submit that the New York Court of Appeals merely followed this Court's guidelines and that if police officers in the future act pursuant to such directives, there will be no problem for their own safety or for the Fourth Amendment privacy rights of potential defendants.

Correct Decision Below

In holding that the warrantless search of the zippered pockets of the unaccessible jacket was not a permissible search incident to a lawful arrest - since there was no danger that the defendant or his companions could reach the article - the Court of Appeals relied upon this Court's decisions in Arkansas v. Sanders, 442 U.S. 753 (1979) and United States v. Chadwick, 433 U.S. 1 (1977). Specifically, the Court of Appeals stated:

> "That defendant retained an expectation of privacy in the contents of his jacket pockets notwithstanding the fact of his arrest is beyond dispute. Indeed, it is difficult to imagine a more private receptacle where one might place one's most personal items than the zippered recesses of a jacket. Defendant's

> arrest, standing alone, did not vitiate that privacy interest by being converted into a license for law enforcement authorities to engage in a warrantless search of unlimited temporal and geographic scope. Once defendant had been removed from the automobile and placed under arrest, a search of the interiors of a private receptacle safely within the exclusive custody and control of the police may not be upheld as incident to his arrest [citing Chadwick, supra and Sanders, supra]. The car was in a secure place where it could have been easily guarded, its occupants under arrest and safely away from the vehicle, their removal to the police station imminent. There was, therefore, no reason why the search should not have awaited the issuance of a warrant" (50 N.Y.2d at 452, 429 N.Y.S.2d at 577).

When the decision of the New York Court of Appeals is so clearly in line with this Court's rulings, there exists no reason whatsoever for this Court to grant the petition. Moreover, the cases cited by petitioner as being "in complete disharmony" are readily distinguishable on the facts from the instant case.

For example, in United States v. Wilkerson, 598 F.2d 621 (D.C. Cir. 1978), after the appellant passenger had alighted from the vehicle at the officer's request, the officer looked into the front passenger compartment where he noticed a coat in the front seat which appeared to be wrapped around something. The officer reached into the front seat and placed his hand on the coat, pressed it and felt something like a shotgun. Upon unwrapping the coat, the officer discovered a sawed-off shotgun. None of the passengers in Wilkerson, supra, had been frisked prior to the officer's arrest. Thus, in Wilkerson, supra, unlike in the present case, the officer felt the outside of the article before searching further. A similar situation existed in United States v. Foster,

584 F.2d 997 (D.C. Cir.), cert. denied, 99 S.Ct. 620 (1978), where a police officer arrested a driver in a parked car for a marijuana violation. The officer ordered the driver out of the car and patted him down. As he was doing so, he saw a folded grocery bag being passed from the front seat passenger to the two passengers in the back seat who proceeded to push it back and forth between them. These actions were conducted in a stealthy manner such that the officer believed the bag contained a weapon. Therefore, he felt the bag and determined by this sense that its contents included a soft object and something which he believed to be some type of weapon, thus justifying his opening of the bag. The New York Court of Appeals was not faced with a situation where the trooper had felt the outside of the jacket and determined that a weapon was inside one of the zippered pockets.* However, the record is clear that even after patting down the jacket and finding no evidence of a dangerous instrumentality, the trooper nevertheless opened the private recesses of this unaccessible item of personal clothing.

In United States v. Agostino, 608 F.2d 1035 (5th Cir. 1979), the court upheld the warrantless seizure of the cocaine because it was in plain view or, in the alternative, because it found that a defendant-driver could reach the floor of the front seat of the vehicle. Similarly, the search in United States v. Campbell, 575 F.2d 505 (5th Cir. 1978), was sustained because the court specifically found that the clothing was within the reach of the defendant such that he could have obtained a weapon to use against

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* The jacket, in the trooper's exclusive possession, however, would still be unreachable to the four defendants.

the arresting officer. In our case, there was no finding in the trial court that the jacket, lying in the middle of the back seat of a two-door vehicle, was accessible to any of the four defendants, all of whom were standing outside of the automobile, arrested, searched and in the custody of an armed state trooper. In fact, as the New York Court of Appeals' opinion notes, the jacket in this case was not accessible by petitioner or any of his confederates. Therefore, those cases cited by petitioner in a vain attempt to convince this Court that federal Courts of Appeals have decided the issue differently are simply not on point. In both United States v. Garcia, 605 F.2d 349 (7th Cir. 1979) and United States v. Ajlouny, 476 F.Supp. 995 (E.D.N.Y. 1979), the receptacle that was searched (e.g., a suitcase or a briefcase) were found to be ready to hand and within the immediate control of the defendant.

The state cases cited by petitioner for his untenable claim that the New York Court of Appeals incorrectly decided the present case are no more persuasive. For example, in State v. Hunter, 261 S.E.2d 189 (N.C. 1980), the police had probable cause to believe that the defendant had just committed the crime of rape at gun point. The court upheld the seizure of the weapon from under the front seat as a search incident to the defendant's arrest because it found that the area in the front seat was within his immediate control. Moreover, in Hunter, there existed proable cause to believe that a gun was present in the vehicle in which the defendant had allegedly just committed a violent crime. The situation of an alleged rapist whom the police had probable cause to believe was armed is vastly different from that presented by our case where respondent and his companions were arrested for possession for a quantity of marijuana so small it did not even amount to a crime.

In State v. Wilkens, 354 So.2d 934 (La. 1978), a syringe was discovered on the floor in the front of the driver's seat directly below where the defendant stood. Not only was this area within the "grabbable" range of the defendant, the syringe may be said to have been within the plain view of the officer. In our case, however, the discovery of the cocaine wihin the zippered pockets of a black leather jacket in the back seat of a car, while respondent and his confederates were outside of the vehicle, cannot be said to have been within the immediate area or in plain view. Accordingly, neither Hunter nor Wilkens present any authority for this Court to review the correct decision of the New York Court of Appeals.

Petitioner would have this Court set forth a precise formula to be applied to every unique factual situation. Thus, petitioner would want this Court to hold that no search incident to arrest and seizure of evidence from outside of the defendant's immediate area is illegal unless there were "x" number of police officers per "y" number of defendants, and "z" number of sets of handcuffs, etc. No such simple formula is possible, however, because every confrontation between a citizen and police is different. Therefore, the most that can be done is for the various state courts to follow the law set forth by this Court. The New York Court of Appeals did precisely that in arriving at the conclusion that the search was illegal. Because the Montana Supreme Court in State v. Cripps, 582 P.2d 312 (Mont. 1978) or the Louisiana Supreme Court in State v. Blanchard, 374 So.2d 1248 (La. 1978), came to slightly different conclusions, operating with different factual data, does not render the decision of the New York Court of Appeals incorrect. Every police/citizen encounter is different.

Thus, a review of the well-reasoned opinion by New York's highest court should be sufficient to convince this Court that the majority of the New York Court of Appeals properly applied the most recent body of Fourth Amendment law. We respectfully submit that to grant this petition would merely result in an unnecessary and repetitive statement of the law which is clear and was properly applied below.

Conclusion

For all these reasons, the Court should deny this petition for certiorari.

September 25, 1980

Respectfully submitted,

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Roger Belton

Sworn to before me this
25th day of September, 1980.

Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 1981

80-378

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BARBARA M. HAGAN, being duly sworn, deposes and says, that on the 25th day of September, 1980, she served one copy of the within Motion to Proceed In Forma Pauperis and Brief in Opposition to Petition for Writ of Certiorari on James R. Harvey, Esq., District Attorney, Ontario County, by enclosing a true copy thereof in a securely sealed postage paid wrapper, and depositing the same in a Post Office box regularly maintained by the United States Postal Service at 65 Court Street, County of Erie, City of Buffalo, New York, directed to said James R. Harvey, Esq., District Attorney, Ontario County, Ontario County Courthouse, Canandaigua, New York, 14424, that being the address within the State designated by him for that purpose on the preceding papers in this action.

Barbara M. Hagan
BARBARA M. HAGAN

Sworn to before me this
25 day of September, 1980

Marie La Rocco

No. 80-328

In The

Supreme Court of the United States

OCTOBER TERM, 1980

THE PEOPLE OF THE STATE OF NEW YORK,

v.

ROGER BELTON,

Respondent.

On Writ Of Certiorari To The Court Of Appeals Of New York

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

May a police officer search, as incident to a lawful arrest, a jacket found inside an automobile while the automobile's four occupants, all under arrest, are standing unsecured around the vehicle?

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In The

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THE PEOPLE OF THE STATE OF NEW YORK,
Petitioner,

v.

ROGER BELTON,
Respondent.

On Writ Of Certiorari To The Court Of Appeals Of New York

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The judgment and opinion of the New York Court of Appeals (J.A. 75-84) is reported at 50 N.Y.2d 447. The judgment and opinion of the New York Supreme Court, Appellate Division, Fourth Department (J.A. 69-73) is reported at 68 App. Div. 2d 198.

JURISDICTION

The judgment of the New York Court of Appeals (J.A. 75) was entered on June 5, 1980. The petition for a writ of certiorari was filed on September 2, 1980 and was granted on January 19, 1981. The jurisdiction of this Court rests upon Title 28, United States Code, Section 1257 (3).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment IV:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT

This is a criminal prosecution of the respondent for his unlawful possession of a quantity of cocaine in Ontario County, New York on April 9, 1978. The denial of the respondent's motion to suppress the evidence in this case was ultimately reversed by the New York Court of Appeals, which held that the search of the respondent's jacket, from which the contraband was seized, was not incident to his arrest.

The respondent was a passenger with three male companions in an automobile being driven along the New York State Thruway on April 9, 1978, when their car was stopped at approximately 9:00 o'clock A.M. by New York State Trooper Douglas Nicot for a speeding infraction. Upon approaching the vehicle stopped along the shoulder of this interstate highway, the Trooper asked its driver for his license and registration. The operator of the vehicle rolled down his window, at which time Trooper Nicot smelled the odor of burning marijuana emanating from within the car through the window (J.A. 14, 17). The Trooper was provided the car's registration, from which he determined that the car belonged to a Buffalo, New York woman who was not present in the vehicle. The driver also produced a valid license which was subsequently determined as not his own. It was at this time that the Trooper noticed, on the front floorboard, a small manila envelope, stamped "Supergold," which he

recognized from his experience as a container for marijuana (J.A. 19-20, 36).

The four occupants of the car were ordered out, the driver from his side and the three others from the passengers side.[1] Trooper Nicot patted down the occupants of the car in the order from which they alighted, after which all were standing in close proximity to and around the car (J.A. 19). He also advised the car's driver at this time that the latter was to be issued a summons for speeding. Trooper Nicot then returned to the automobile and examined the envelope he had previously observed, finding it to contain traces of marijuana (J.A. 20). He also observed and recovered five or six partially smoked marijuana cigarettes, or "roaches," in the car's ashtrays (J.A. 22, 40).

Trooper Nicot placed the four individuals under arrest for possession of marijuana, either immediately prior or subsequent to the discovery of the substance in the car (J.A. 18, 39). Having only one set of handcuffs, the Trooper did not place them on any of the four arrestees (J.A. 55, 56). They were advised of their constitutional rights and searched, after which Trooper Nicot searched the interior of the automobile in which they had been riding (J.A. 21). In the course of his search, the Trooper came across five jackets lying in the middle of the back seat. Neither the jackets nor the vehicle's interior had been reduced to the exclusive control of Trooper Nicot at this time. One of the jackets was black leather, with several pockets. In searching that jacket, Trooper Nicot found a twenty dollar bill containing a white powder in one of the pockets, which he suspected to be cocaine (J.A. 21, 24). In another zippered pocket was a plastic bag containing a larger amount of white powder. In a third pocket was found a health insurance card in the name of the respondent (J.A. 22). All four arrestees denied ownership of the jacket, and

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[1]The respondent had been seated in the rear seat, on the driver's side (J.A. 18).

all were placed under arrest for criminal possession of a controlled substance.[2]

The Ontario County Grand Jury returned an indictment against the respondent for criminal possession of a controlled substance in the fifth degree, while directing that no charges be filed against his three companions. Subsequent to his arraignment on the charge, the respondent challenged the search of the car and his jacket at a suppression hearing, his contention being that the search was justified by none of the exceptions to the Fourth Amendment's warrant requirement. However, the Ontario County Court (Hon. George A. Reed, presiding) ruled that exigent circumstances did in fact exist, given the nature of the object searched and the fact that Trooper Nicot, alone, was confronted by four arrestees in a rural area. The suppression motion was, therefore, denied (J.A. 65-66).

The respondent later entered a plea of guilty to the reduced charge of attempted criminal possession of a controlled substance in the sixth degree. Because he had previously been convicted of a felony, the appellant was sentenced to an indeterminate term of one and one-half to three years' imprisonment as a second-felony offender. However, the execution of this sentence was stayed pending the respondent's appeal.

The appeal was taken as of right to the New York State Supreme Court, Appellate Division, Fourth Department, where the respondent's conviction was unanimously affirmed. In its opinion, the Court agreed with our contention that the search was justified as a search incident to arrest, in that the search of the "immediate area" was "reasonable in scope, intensity and duration." Further, permissive appeal to the New York Court of Appeals was granted, and that court, by a divided vote, subsequently reversed the respondent's conviction and dismissed the

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[2]The white powder was subsequently determined through laboratory analysis to in fact contain cocaine.

indictment. In its opinion, the Court of Appeals held that once the respondent had been placed under arrest, his jacket was within the exclusive custody and control of the Trooper, and it could not therefore be searched without a warrant.

SUMMARY OF ARGUMENT

A. In *Chimel v. California*, 395 U.S. 752 (1969), this Court held that once an arrest is made, the arresting officer may thereupon search the person of the arrestee and the area " 'within his immediate control' — construing that phrase to mean the area from within which (the arrestee) might gain possession of a weapon or destructible evidence." *Id.* at 763. The purposes of this rule are twofold: to minimize the potential danger to the arresting officer and others, and to minimize the likelihood that evidence may be concealed or destroyed.

Bearing in mind the language and objectives of *Chimel*, the actions taken by Trooper Nicot in the instant case, in searching a jacket in the automobile in which the four arrestees were riding, is constitutionally unobjectionable as a search incident to a lawful arrest. Considering the facts that this sole officer was confronted by four men, all arrested but standing unsecured in any manner around their car, the conclusion is obvious that any or all of the four arrestees could reach anything located in the confines of their car if they so desired. Thus, the right to search this "grabbable area" was triggered.

The instant case is readily distinguished from *United States v. Chadwick*, 433 U.S. 1 (1977), in which the search of a 200-pound footlocker, one and one-half hours after its possessors' arrest and detention, was suppressed. Unlike that case, the search at bar was contemporaneous "in time and place" with the arrest, *id.* at 15; therefore, it was incident to the arrest.

The New York Court of Appeals erroneously concluded in this case that, by telling the four occupants of the automobile that

they were under arrest and by stationing them outside the car, Trooper Nicot had effectively reduced that car and everything in it to his exclusive control. Such a grotesquely restricted interpretation of the search incident to arrest doctrine not only flies in the face of the plain language of *Chimel* and numerous decisions of other courts, but also forces an arresting officer to forego what should be an entirely legitimate search at the risk of serious injury or death.

In order to provide guidance to courts faced with determining the propriety of searches incident to arrest in the future, factors relevant to an appropriate determination should be more clearly delineated. Such considerations include the number of arrestees as opposed to the number of arresting officers; the degree of restraint, if any, imposed on the arrestees; the relative locations of the arrestees and the police vis-a-vis the item searched; and the ease or difficulty inherent in gaining potential access to the item searched. When the instant case is assessed in light of these criteria, the conclusion becomes inescapable that the search was properly conducted.

B. The recent case of *Arkansas v. Sanders*, 442 U.S. 753 (1979) does not compel a different conclusion. While striking down the search of a suitcase taken by police from the trunk of a taxicab, this Court in *Sanders* did not have the occasion to consider the application of the search incident to arrest doctrine to the search and seizure therein. Beyond that, however, it was quite apparent in the opinion that even articles normally deserving of an expectation of privacy may be searched without a warrant where the exigencies of the situation justify such a search. In the case at bar, such exigencies certainly existed in the fact that Trooper Nicot, unlike the police in *Sanders*, had not reduced the property searched to his exclusive control at the time of the search. Thus, the subject search in this case, consistent with the language in *Arkansas v. Sanders*, comported with the strictures contained in the Fourth Amendment. The judgment of the New York Court of Appeals should therefore be reversed.

ARGUMENT

I

The search of the respondent's jacket was properly conducted as a search incident to the respondent's lawful arrest.

A. *The search of the respondent's jacket falls squarely under the doctrine of search incident to arrest as explained in Chimel v. California.*

It has been the contention of the Petitioner in this case, from the initial suppression hearing through every stage of appellate review, that the search conducted by New York State Trooper Nicot of the respondent's jacket was permissible as incidental to the latter's lawful arrest, and therefore not governed by the warrant requirement of the Fourth Amendment.[3] An evaluation of that assertion must begin with reference to this Court's seminal decision in *Chimel v. California*, 395 U.S. 752 (1969), wherein the scope of searches incident to arrest first recognized as lawful in *Weeks v. United States*, 232 U.S. 383 (1914), was explained.

In *Chimel*, the analysis of the doctrine was described thusly:

> "When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. . . . In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee *might reach in order to grab a weapon or evidentiary items* must, of course, be governed by a like rule. . . . There is ample justification, therefore, for a search of the arrestee's person and the area *'within his immediate control' — construing that phrase to mean the area from within which he might gain*

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[3]The respondent has conceded at every stage of this proceeding that both the initial stop for speeding and the subsequent arrest for possession of marijuana were lawful.

possession of a weapon or destructible evidence." 395 U.S. at 762, 763 (emphasis added).

Clearly, in the instant case, the search of the respondent's jacket was not a search of his person. The jacket was in a pile with four other jackets in the back seat of the automobile. The four occupants were placed under arrest but not secured in any manner. All were standing immediately alongside the vehicle as Trooper Nicot searched the jacket. The analysis of this case thus may be further refined to the issue of whether the search by the Trooper was of an area from which the four arrestees "might reach in order to grab a weapon or evidentiary items." *Id.*, at 763. Parenthetically, it hardly needs comment that, although the cocaine was discovered in the respondent's jacket, the relevant inquiry is whether, at the time of the search, *any or all* of the four arrestees had potential access to the jackets in the vehicle.

Although the guidance provided in *Chimel* is instructive in determining the issue at bar, factually the two cases are dissimilar. In *Chimel*, three police officers searched the entire house of the defendant, from attic to garage, after placing him under arrest, asserting that the authority for the search was the arrest itself. In the present case, however, significant distinctions exist. For example, rather than outnumbering the arrestee as did the three policemen in *Chimel*, here there was only one police officer with four arrested subjects, and the arrest took place on a busy interstate highway. Furthermore, the officer lacked the capability to secure or restrain his arrestees, having only one set of handcuffs. Beyond that, the search occurred not in a dwelling, but in an automobile, and "one's expectation of privacy in an automobile . . . (is) significantly different from the traditional expectation of privacy and freedom in one's residence." *Rakas v. Illinois*, 439 U.S. 128, 148 (1978; fn. 15); *United States v. Martinez-Fuerte*, 428 U.S. 543, 561 (1976). And finally, the search of the vehicle and the jacket inside it occurred immediately after the arrest of the four for possession of

marijuana, and while the four were in close proximity to Trooper Nicot and the car.

The latter factors just noted rise to critical importance when considered in the context of another of this Court's major pronouncements relating to the search incident doctrine, *United States v. Chadwick*, 433 U.S. 1 (1977). In *Chadwick*, federal agents, acting on probable cause to believe that a double-locked, 200-pound footlocker contained contraband, arrested its two possessors, separated them from the footlocker, transported the arrestees and the footlocker to the federal building, and conducted a warrantless search of the locker one and one-half hours after the arrests. The federal agents admitted that the locker was under their exclusive control at the time of the search. Ruling that the defendants were entitled to the protection of the Fourth Amendment once the officers assumed exclusive control of the footlocker, the Court suppressed the evidence derived from the search. The decision appears quite clearly to have turned on the fact that the search of the footlocker occurred some 90 minutes after the federal agents had gained exclusive control of the same and long after the defendants were securely in custody. Reiterating prior decisional law, it was stated that:

> "(W)arrantless searches of luggage or other property seized at the time of an arrest cannot be justified as incident to that arrest either if the 'search is remote in time and place from the arrest,' *Preston v. United States*, 376 U.S. at 367, . . . or no exigency exists. Once law enforcement officers have reduced luggage or other personal property not immediately associated with the person of the arrestee to their exclusive control, and there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer an incident of the arrest." 433 U.S. at 15.

Thus, *Chadwick* stands for the proposition that a search cannot be sustained as incidental to an arrest if the property

being searched has been reduced to the exclusive control of the police. However, *Chadwick* does not prohibit a search as incident to arrest where the property in question has not come under the exclusive control of the police. This is clearly the factual situation presented in the instant case, with the jackets lying in the open vehicle's back seat. Furthermore, rather than being "remote in time or place" to the arrest, the search of the jackets was contemporaneous and coterminous with the arrest of the four individuals. *Chadwick's* holding is extremely instructive when applied to the facts of this case, and provides persuasive support for our position. Unlike the 200-pound footlocker in that case, the Trooper herein seized a portable, black leather jacket. Furthermore, unlike the 90-minute delay between arrest and search in *Chadwick*, Trooper Nicot executed his search *immediately* after the arrest. And, perhaps most importantly, Trooper Nicot was faced with the uncertainties posed by four unrestrained arrestees all in close proximity to him at the time of the search, a far cry from the situation faced by the federal agents in *Chadwick*, who had already placed the two defendants there in secure custody at the time of their search. Perhaps the dissent in the instant case in the New York Court of Appeals described the situation best when it was characterized at the time of the search as "still fluid." *People v. Belton*, 50 N.Y.2d 447 (1980; Gabrielli, J., dissenting). The Trooper could not readily secure the vehicle with all of its contents, parked on an interstate highway, and still transport his four arrestees to secure detention. Trooper Nicot would certainly have been negligent to have let his prisoners remove their possessions from the vehicle without first searching those possessions for weapons or additional contraband. Interpreting the search by Trooper Nicot in the case at bar as violative of the Fourth Amendment would certainly add irretrievably to making the criminal law "a trap for the unwary policeman and distract from the important activities of detecting criminal activity and protecting the public

safety." *United States v. Chadwick, supra,* at 24 (Blackmun, J., dissenting).

This Court has repeatedly emphasized that whether a search can be sustained as incidental to a lawful arrest depends upon the factual situation in which the police and their arrestees find themselves. For example, in *Preston v. United States,* 376 U.S. 364 (1964), cited with approval in *Chadwick,* a search of the automobile in which three persons who were arrested for vagrancy had been situated was invalidated where the search occurred after the police drove the vehicle to their station and then had it towed to a garage, after the arrestees were confined in the police station. In holding the search not incidental to the arrest, this Court's opinion centered on the fact that the search was "remote in time or place from the arrest." 376 U.S. at 367.

Again, in *Dyke v. Taylor Implement Co.,* 391 U.S. 216 (1967), this Court struck down a search, purportedly incidental to a lawful arrest, where the car being driven by an arrestee was searched while it was parked outside the jail in which the arrestee was already incarcerated. Citing *Preston's* holding that a search conducted "remote in time or place" from an arrest is not an incident of the arrest, the fruits of the search conducted in *Dyke* were suppressed.

Unlike the factual patterns presented in *Preston* and *Dyke,* or even in *Chadwick,* the search conducted by Trooper Nicot clearly was neither remote in time nor place from the arrest. The vehicle and its contents cannot be considered to have been reduced to the exclusive control of the Trooper. The occupants of the vehicle, while under arrest, were not secured; they were all standing around the car, and the jackets in the back seat were certainly within their immediate area. As compared with the clear lack of access to the seized items by the arrestees in *Chadwick, Preston* or *Dyke,* the arrestees in the instant case certainly had potential access to the property in question, i.e., the jacket on the back seat.

The facts adduced at the suppression hearing show that Trooper Nicot stationed all four arrestees around their car as he frisked them following the initial detainment. As he testified, the four were "all in close proximity . . . around the car" (J.A. 19). Thereafter, following his discovery of the marijuana in the car, the four were brought together to be read their Miranda rights, but were not secured in any fashion. Indeed, Trooper Nicot only had the capacity to restrain one of the four, insofar as he only possessed one set of handcuffs. No other police officers were at the scene.

To assert that the contents of the automobile, including the respondent's jacket, were reduced to the exclusive custody of the Trooper merely because all four arrestees were standing outside the car and had been advised they were under arrest borders on the ludicrous. It would certainly have been a simple matter for the four to overpower the officer, who had not drawn his service revolver, or to rush him to grab whatever they desired from the recesses of the car. Under the facts of this case, any of the arrestees, either acting alone or in concert, could easily have reached into the car to grab a weapon or, for that matter, to grab the cocaine and scatter it to the wind, thus destroying the only tangible evidence of the crime then existing in the car.[4]

At the time Trooper Nicot began his search of the car, there was no overt indication that any weapons were secreted in the car, although it was certainly plausible that contraband in the form of drugs was located therein. However, Trooper Nicot

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[4]Entirely apart from the above, one must consider whether the constitutionality of the instant search should really even turn on the chance circumstance that, at the time of the stop, the respondent's jacket was beside him on the back seat rather than worn. Had the jacket been worn by the respondent at the time of a search, there is no question but that a search of its pockets would have been permissible under *United States v. Robinson*, 414 U.S. 218 (1973), discussed *infra*. Should the mere happenstance that the respondent may have removed the jacket moments earlier and set it beside him alter the constitutional picture so markedly?

having had a lawful basis to search the car (as incident to arrest), the question of the likelihood of illicit substances being found therein became irrelevant. "The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect. A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification." *United States v. Robinson*, 414 U.S. 218, 235 (1973). While the issue in *Robinson* was confined to a search of the defendant's person, under the reasoning of *Chimel* and *Chadwick* the same conclusion must, *a fortiori*, obtain concerning searches of the "grabbable area" of an arrestee. "Such searches may be conducted without a warrant, and they may also be made whether or not there is probable cause to believe that the person arrested may have a weapon or is about to destroy evidence. The potential dangers lurking in all custodial arrests make warrantless searches of items within the 'immediate control' area reasonable without requiring the arresting officer to calculate the probability that weapons or destructible evidence may be involved. *United States v. Chadwick, supra*, at 14, 15. Thus, the same concerns espoused by this Court in *Robinson* in approving searches of the person incident to arrest, (i.e., "the need to disarm and to discover evidence," ibid.) are also the same concerns espoused by this Court in *Chimel* and *Chadwick, supra*.[5]

The same conclusion obtains with even greater force when the particular area to be searched incident to arrest involves a

[5]This point also effectively negates respondent's contention, advanced in his brief in opposition to the petition for writ of certiorari in this case, that since there was no finding made that Trooper Nicot was in danger, we are now precluded from relying on the possibility of danger to the officer as a circumstance justifying the search.

vehicle and its contents. This Court has specifically refused to draw the conclusion that persons arrested for traffic offenses are less likely to possess dangerous weapons than are those arrested for other crimes. See *United States v. Robinson, supra,* at 234. "It is scarcely open to doubt that the danger to an officer is far greater in the case of the extended exposure which follows the taking of a suspect into custody and transporting him to the police station than in the case of the relatively fleeting Terry-type stop." *Id.,* at 234, 235. There is certainly a wealth of statistical information available which supports this conclusion. Unfortunately, to the statistics cited in footnote four to the majority's opinion in *Robinson* may be added the growing number of assaults on police officers during traffic stops. The latest figure in a series of yearly increases shows that 6,329 officers were assaulted in 1979 during the course of traffic stops of vehicles. This figure represents an increase of over one thousand such assaults in just three years. Beyond that, 82 police officers were murdered during the course of routine traffic stops during the five-year period between 1975 and 1979.[6]

While, with the exception of *Arkansas v. Sanders,* 442 U.S. 753 (1979), discussed *infra,* this Court has not heretofore written on the subject of a warrantless search of effects taken from an automobile lawfully stopped (as opposed to a search of some integral part of the automobile itself; see *Arkansas v. Sanders, supra,* at 763) numerous federal courts and state courts of last resort have had the opportunity to apply this Court's decisions to cases posing similar questions as that at bar. The resulting decisions of these courts have quite consistently produced thoughtful and articulate interpretations of the search incident to arrest doctrine in a manner consonant with our position concerning the legality of the present search.

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[6]Source: *Crime in the United States,* 1975-1979, Uniform Crime Reports of the United States Department of Justice; *Law Enforcement Officers Killed,* 1975-1980, Uniform Crime Reports of the United States Department of Justice.

A brief review of some of these cases is illustrative in demonstrating the types of considerations properly employed by the courts in determining whether a particular search was incidental to an arrest. Where the situation is still "fluid," and the area or items searched have not been reduced to the exclusive control of the police, as was the situation in the present case, courts have sustained searches of automobiles and their contents as properly incidental to the arrest. Examples of these decisions include *United States v. Fontecha*, 576 F.2d 601 (5th Cir., 1978; sustaining search of unlocked suitcase in back seat of car by one officer confronted by two arrestees, one still in car at time of search); *United States v. Foster*, 584 F.2d 997 (D.C. Cir., 1978; sustaining search of grocery bag between two front seats while four arrestees were located in and about car); *United States v. Wilkerson*, 598 F.2d 621 (D.C. Cir., 1978; sustaining search of coat on front seat of car by one of five officers as defendants stood outside car and one remained inside); *North Carolina v. Hunter*, 299 N.C. 29, 261 S.E. 2d 189 (1980; sustaining search of front seat area of car while defendant standing outside open door with hands on car's roof); *Banks v. Georgia*, 246 Ga. 178, 269 S.E. 2d 450 (1980; sustaining search of shirt on car's floor while defendant leaning against car while car door open); *Louisiana v. Wilkins*, 364 So. 2d 934 (1978; sustaining search of floor of taxicab while arrestee standing by car's open door with hands on roof). Other cases upholding searches under circumstances similar to those noted above include *United States v. Agostino*, 608 F.2d 1035 (5th Cir., 1979); *United States v. Ajlouny*, 476 F. Supp. 995 (E.D.N.Y., 1979); *United States v. Ocampo*, 492 F. Supp. 1211 (E.D.N.Y., 1980).

In *United States v. Fontecha, supra*, the Fifth Circuit Court of Appeals prudently observed that:

> "At the time that (the police officer) stopped Fontecha's car, he had no way of knowing what dangers, if any, he faced or what plans the two occupants of the car might have had for disposing of evidence (footnote omitted). This

> two-on-one confrontation involving an automobile on a deserted road furnished sufficient exigent circumstances — judged as of that time and not in light of subsequent events — to justify an immediate search . . . ." 576 F.2d at 605.

Similarly, in *United States v. Wilkerson, supra,* the Court of Appeals recognized precisely the point we are advancing in this brief, when it noted:

> "It takes little imagination to realize that an armed suspect might hide his weapon in a car before getting out in response to a police order. Thereafter standing next to the car without handcuffs, either the driver or one of the passengers could have bolted to it, seized a weapon and fired before the officers could find cover." 598 F.2d at 625.

By the same token, it takes little imagination to realize that a suspect might well also secrete illicit, readily destructible drugs in a car before exiting it in response to a police order. The basic issue thus returns to an assessment as to whether the contents of the automobile had been reduced to the complete and exclusive control of the arresting officer, or whether the contents could still be retrieved by one or more of the arrestees if they rushed into the car.

In a number of other cases, courts have invalidated searches of a car's interior or contents, but in each such case a critical element relating to the custody of the items searched was different. For example, searches of effects in a car, even if the arrestees are nearby, have usually been struck down if, among other factors, the arrestees have been handcuffed, thereby reducing the property to the exclusive control of the police. See, e.g., *United States v. Neumann,* 585 F.2d 355 (8th Cir., 1978); *United States v. Schleis,* 582 F.2d 1166 (8th Cir., 1978); *New Jersey v. Welsh,* 84 N.J. 346, 419 A.2d 1123 (1980). Still other cases have invalidated searches purportedly incidental to arrest when the item searched has been reduced to the exclusive control of the police due to the fact that the arrestees have been im-

mobilized by a greater number of police. See, e.g., *Rhode Island v. Robalewski*, 418 A.2d 817 (1980); *Montana v. Cripps*, 582 P.2d 312 (1978); *Louisiana v. Blanchard*, 374 So. 2d 1248 (1979). A number of other decisions have ruled invalid searches conducted so far removed in time or space from the arrest as to be clearly not incidental to the arrest.

Each of the cases cited above involved the sifting together of a variety of factors all relevant under the application of the search incident to arrest doctrine. We feel confident in asserting that any of these courts, utilizing the same analytical considerations espoused in their own decisions, would have sustained the search conducted in the instant case if presented with its factual pattern. The fact that the New York Court of Appeals has decided contrarily is an anomaly, an aberration in an otherwise generally consistent approach by the various courts in the nation. It is this anomaly that must be corrected by this Court.

In the respondent's brief in opposition to the petition for a writ of certiorari in this case, it is argued that we are asking this Court to arrive at an inflexible formula whose variables would include the number of defendants, the number of police officers, and the number of sets of handcuffs. We are asking this Court to do no such thing. We *are* submitting, however, that under the standards enunciated in *Chimel v. California, supra*, and its progeny, each case must be examined with an eye toward its own particular facts, and among those facts are the number of participants and the degree of restraint, if any, imposed upon the arrestees. This same conclusion was articulately explained by the Supreme Court of New Jersey in *New Jersey v. Welsh, supra:*

> "The relevant facts, then, appear to be those which disclose what places the person under arrest presently could reach at the time the arrest is undertaken and how likely it is that he would attempt resistance or escape or destruction of evidence. Important considerations are

> whether the arrestee has been placed under some form of restraint, the positions of defendant and the arresting officer in relation to the vehicle, the difficulties to be encountered in gaining access to the vehicle as to the particular area therein searched, and the number of officers present as compared with the number of persons arrested or bystanders in the immediate vicinity." 419 A. 2d at 1127.

Similarly, Professor LaFave, in his recent treatise on search and seizure law, listed the criteria generally employed by the nation's courts in following this Court's decision in *Chimel* and its "immediate control" test as it relates to vehicles. The relevant considerations cited by LaFave include (1) whether the arrestee was placed in some form of restraints; (2) the location of the arrestee vis-a-vis the automobile; (3) the ease or difficulty of the arrestee's gaining entry to the vehicle's interior; and (4) the number of officers present in relation to the number of arrestees. 2W. LaFave, *Search and Seizure*, §7.1 (b) (1978).

While this common-sense approach has been implicit throughout this Court's pronouncements on searches incident to arrest in the past, a clear statement from this Court to the effect that these are the types of factors courts must consider when assessing the propriety of searches incident to arrest might well serve to prevent, or at least minimize, the occasion of erroneous interpretations of the law such as was rendered by the New York Court of Appeals in this case.

Beyond that, however, the New York Court of Appeals' opinion also distorts the clear meaning of the concept of "immediate" or "exclusive" control, the point beyond which a search conducted following an arrest is no longer incident to it. Analyzing the opinion of the Court of Appeals on its face, it becomes evident that, as Judge Gabrielli noted in dissent, the majority considers that "since the suspects were standing outside the car at the time of the search and had been told that they were under arrest, both their persons and their property

had thereby been conclusively and safely reduced to the complete control of the officer, as a matter of law." *People v. Belton, supra,* at 454, 455. Such a patently erroneous interpretation of the basic doctrine of *Chimel v. California* should be clearly repudiated.

Even a brief review of the circumstances facing the Trooper in this case at the time he arrested his four subjects makes it amply clear that he acted in an entirely appropriate fashion. Obviously, all four arrestees had not been secured or immobilized, nor did Trooper Nicot posses the capacity at that time and place to do so. There were no other officers at the scene. The Trooper had the right, and we submit, the duty as well, to make certain that his safety was not threatened by the four men in his presence, and that any evidence secreted in the car was not destroyed. To hold to anything less under the facts of this case will have the effect of requiring police officers such as Trooper Nicot to choose between insuring that concerns of personal safety and preservation of evidence are met, or risking the suppression of tangible, probative evidence such as that recovered in the instant case. "Surely, the Constitution does not require police officers to make the unhappy choice between dereliction of duty and risk of death . . . (T)he Fourth Amendment's proscription against unreasonable searches and seizures (does not) require officers . . . to risk their lives needlessly in the performance of their duty." *New York v. Earl,* 431 U.S. 943 (1977; Burger, C.J., dissenting from cert. den.).

As noted earlier, the majority opinion in the New York Court of Appeals seems to indicate that once a person is told he is arrested and steps out of his automobile, everything inside that vehicle has thereby been conclusively reduced to the exclusive control of the arresting officer. As Judge Gabrielli noted in his dissent from that conclusion, "one might well wish that all criminal suspects could so readily be subdued as a matter of law, (but) I cannot agree with a decision that requires a police officer

to stake his very life upon the validity of such a questionable presumption." *New York v. Belton, supra,* at 455 (Gabrielli, J., dissenting).

In short, this is not a case such as those previously presented to this Court in *Preston, Dyke, Chimel* or *Chadwick, supra.* In each of those cases and others like them there was no possible way that the particular arrestee involved could gain access to the particular area searched. As such, the facts in the instant case are markedly different. We believe a considered approach to this case must result in the clear and inescapable conclusion that the subject property had simply not been reduced to the Trooper's exclusive control. Any or all of the four arrestees could have gained access to the jacket if they had chosen to do so. Accordingly, Trooper Nicot's actions in searching the jacket should be sustained, the fruits of the search should be declared admissible, and the respondent's conviction should be reinstated.

B. *The Decision of Arkansas v. Sanders Does Not Affect the Validity of the Instant Search*

In the recent decision of *Arkansas v. Sanders,* 442 U.S. 753 (1979), this Court reiterated its pronouncement, in the context of the warrant clause of the Fourth Amendment, that "a few 'jealously and carefully drawn' (footnote omitted) exceptions provide for those cases where the societal costs of obtaining a warrant, *such as danger to law officers or the risk of loss or destruction of evidence,* outweigh the reasons for prior recourse to a neutral magistrate (citation omitted; emphasis added)." Id., at 759. Ever since the release of the decision and opinion in *Sanders,* the respondent has sought to place his case within its parameters. In fact, the respondent would argue that *Sanders* is a cloak for the suppression of any evidence found in the course of a warrantless search of receptacles located in an automobile. In doing so, he ignores the long-standing justification for certain warrantless searches found in the doctrine of search incident to a lawful arrest, to which this Court referred in the above quotation. It will thus become clear, in the analysis below, that

Sanders is in reality clearly and easily distinguished from the case at bar.

"(A)n apparently small difference in the factual situation frequently is viewed as a controlling difference in determining Fourth Amendment rights." Id., at 757. This is true in the instant case as well; certainly the facts and circumstances involved in this matter are the key to the determination of the issue presented.

In *Sanders*, members of the Little Rock, Arkansas Police Department, acting on an informant's tip, placed an airport under surveillance for an individual who was to be carrying a green suitcase containing marijuana. The police observed the defendant pick up the suitcase from the baggage area, meet another man there, hail a taxicab, place the suitcase into its trunk, and depart in the taxi. The cab was stopped several blocks away by two police officers who had followed the defendant from the airport, with the assistance of another patrol car. The police then asked the cab driver to open the trunk. This having been done, the police opened the suitcase on the spot, and the marijuana contained in it was discovered.

This Court held the search, having been conducted without a warrant, to be invalid. In so holding, the Court expressly refused to extend the "automobile exception" to the warrant requirement, first postulated in *Carroll v. United States*, 267 U.S. 132 (1925) and expounded upon in *Chambers v. Maroney*, 399 U.S. 42 (1970), to allow warrantless searches of personal luggage located in an automobile, absent the existence of exigent circumstances. "(A) suitcase taken from an automobile stopped on the highway is not necessarily attended by any lesser expectation of privacy than is associated with luggage taken from other locations." *Arkansas v. Sanders, supra*, at 764.

This Court expressly did *not* consider, however, in either the majority or dissenting opinions, the question of whether the search could have been upheld as one incident to a lawful arrest.

> "(W)e (do not) consider the constitutionality of searches of luggage incident to the arrest of its possessor . . . The State has not argued that respondent's suitcase was searched incident to his arrest, and it appears that the bag was not within his 'immediate control' at the time of the search." Id., at 763, 764 (fn.11). "Since respondent was not formally arrested until after the suitcase was searched, the State does not argue that the suitcase was examined as part of a search incident to a custodial arrest." Id., at 769 (fn. 1; Blackmun, J., dissenting).

Beyond these clear statements themselves, other passages from the opinion make it abundantly obvious that *Sanders* is simply not a case invoking the search incident to arrest doctrine. For example, there is no question but that the luggage seized by the police was in their exclusive control at the time of the search. "(T)he officers had seized the luggage and had it exclusively within their control at the time of the search. Consequently, '*there was not the slightest danger* that (the luggage) or its contents could have been removed before a valid search warrant could be obtained.' " Id., at 762 (emphasis added).

Furthermore, this Court concluded its opinion by stating that "(W)here — as in the present case — the police, *without endangering themselves or risking loss of the evidence,* lawfully have detained one suspected of criminal activity *and secured his suitcase,* they should delay the search thereof until after judicial approval has been obtained." Id., at 766 (emphasis added). All of the foregoing simply demonstrates that, while the government did not argue that the search in *Sanders* was conducted incident to an arrest, the facts would probably not have sustained the search on that theory even if the government has pressed that argument, as the suitcase involved had been reduced to exclusive police control prior to its search.

This is not to say, however, that a search that is properly conducted as incident to arrest may not extend to a suitcase, such as that searched in *Sanders,* or other receptacles deserving of an ex-

pectation of privacy. On the contrary, the language cited above makes it quite clear that where the concerns justifying a search incident to arrest (i.e., personal safety and preservation of evidence) cannot be allayed prior to obtaining a warrant, then a search of such effects is entirely proper and reasonable. In noting that "special exigencies" may justify the warrantless search of a suitcase, this Court observed that such exigencies generally will depend "upon the probable contents of the luggage *and the suspect's access to those contents*, not upon whether the luggage is taken from an automobile." Id., at 763, 764 (fn.11; emphasis added). This language is then followed by the remark that the State in *Sanders* conceded that there were no exigencies in that case. The same certainly cannot be said of the instant case. We submit that the record clearly demonstrates the existence of exigent circumstances at the time of the search at bar, in that the search was of an area ready to hand of the arrestees.

A brief contrasting of the facts existing in this case with those present in *Sanders* underscores our point. In *Sanders*, there were at least three police officers and the taxicab driver present with the two defendants, unlike the four-on-one confrontation with which Trooper Nicot was faced in the present matter. Furthermore, while the defendants in *Sanders* apparently were neutralized by the greater number of police the four arrestees at bar were neither handcuffed nor secured in any other fasion. The police in *Sanders* knew in advance, on a tip from a reliable informant, that the particular suitcase involved contained contraband. Beyond that, the suitcase was locked in the taxicab's trunk, to which presumably only the cab driver had the key. In the instant case, Trooper Nicot had no knowledge of what was present in any area of the stopped automobile. In addition, the car was unlocked with the jackets in question lying in the center of the back seat. (Although it is not clear from the record, it seems quite likely that the vehicle's doors were open at the time). Finally, unlike *Sanders*, the four defendants in the instant matter had unequivocally been placed under arrest prior to the

search. In short, the circumstances surrounding the search in the instant case which justify it as incident to arrest simply did not correspondingly exist at the time of the search invalidated in *Sanders*.

From all of the foregoing it is clear that, notwithstanding the result in *Arkansas v. Sanders*, a search of luggage or other personal effects carrying an expectation of privacy may legally and constitutionally be conducted if incidental to a lawful arrest and the article has not been reduced to the exclusive control of the officer. Thus, all of the respondent's exhortations in the instant case, that the search of his jacket was unconstitutional because his expectation of privacy in it required a warrant, are misplaced as the jacket had not been removed from the ambit of potential access by the respondent or his fellow passengers.[7]

The same conclusion, that a warrantless search of an article (even one otherwise deserving of an expectation of privacy significant enough to compel a warrant under normal circumstances) will be sustained upon a showing of necessity therefor or exigent circumstances, can be drawn from this Court's opinion in *United States v. Chadwick*, 433 U.S. 1 (1977). As was there noted, *"(W)ith the footlocker safely immobilized*, it was unreasonable to

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[7]In any event, the respondent's claims relating to his purported right to privacy in the jacket are misplaced for another reason as well. While "the very purpose of a suitcase is to serve as a repository for personal items when one wishes to transport them," *Arkansas v. Sanders, supra*, at 764, a jacket carries no similar purpose. As this Court has noted, "not all containers and packages found by police during the course of a search will deserve the full protection of the Fourth Amendment." *Id.*, at 764, 765 (fn. 13). Obviously, a jacket is essentially utilized to shield one from the elements. Any use of it as storage for personal items must be regarded as merely incidental to its main function. Thus, while a particular item searched "may be used as a repository of personal effects, the mere possibility of such use does not lead to the conclusion that such containers are *inevitably* associated with an expectation of privacy for purposes of determining whether a warrantless search thereof violates the Fourth Amendment." *United States v. Goshern*, 628 F.2d 697 (1st Cir., 1980).

undertake the additional and greater intrusion of a search without a warrant." Id., at 13 (emphasis added). *"There being no exigency,* it was unreasonable for the Government to conduct this search without the safeguards a judicial warrant provides." Id., at 11 (emphasis added).

Clearly, again, the issue of the reduction of the searched property to exclusive police control at the time of the search is the key to the determination of the validity of the search. We submit that, for all of the reasons discussed in this brief demonstrating why the subject jacket was not in the exclusive control of Trooper Nicot at the time he searched it, the search was thus lawful as incident to the respondent's arrest. The search was properly undertaken to insure the personal safety of the Trooper and the preservation of any readily destructible evidence. That being the case, the rule of *Arkansas v. Sanders,* relied upon by the respondent, is simply not relevant to this case.

CONCLUSION

The judgment of the New York Court of Appeals granting the respondent's motion to suppress and dismissing the indictment (J.A. 75) should be reversed.

Respectfully submitted,

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No. 80-328

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1980

THE PEOPLE OF THE STATE OF NEW YORK,
Petitioner,

v.

ROGER BELTON,
Respondent.

ON WRIT OF CERTIORARI TO
THE NEW YORK STATE COURT OF APPEALS

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether the warrantless search of respondent's zippered jacket in the absence of exigent circumstances, while it was within the exclusive control of the police (and outside of respondent's reach) and the seizure of contraband from its zippered recesses violates the Fourth Amendment.

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STATEMENT OF THE CASE

On April 9, 1978, respondent Roger Belton and three companions, all of whom were from Buffalo, were travelling west in a blue Chrysler automobile on the New York State Thruway in the area within the jurisdiction of the Town of Phelps (A-13, A-17). New York State Trooper, Douglas Nicot, in an unmarked patrol car, was also travelling westbound in the passing lane (A-13, A-14). When he observed the Chrysler gaining speed on his vehicle, he pulled over to the right hand lane (A-13, A-31). After the blue auto moved in front of the unmarked patrol car, the trooper estimated that it was travelling at approximately 75 miles per hour in a 55 mile per hour zone (A-13, A-31). Trooper Nicot motioned the private vehicle over to the shoulder of the road, to arrest the driver for a speeding violation (A-14, A-42). The driver rolled down his window and complied with the trooper's request for his license and registration (A-14, A-17, A-32). Upon examining the registration, the trooper discovered that the car was not owned by any of the four individuals but was registered to an unrelated woman in Buffalo, and he later discovered that the license produced by the driver was not his own (A-18, A-32). Appellant was seated in the rear seat behind the driver (A-18).

At the subsequent suppression hearing held in Ontario County (New York) Court, the officer testified that he smelled the odor of burning marijuana emanating from inside the stopped automobile (A-14). There was no evidence of any marijuana cigarettes in plain view (A-38). Nevertheless, the trooper concluded that the individuals were unlawfully in possession of marijuana, placed them under arrest and commanded them to exit from the car (A-18). As the four men got out of the vehicle, the officer placed them a distance

apart from each other and conducted a pat-down search for weapons, which proved negative (A-19, A-33, A-35). Trooper Nicot testified that there was no reason to draw his service revolver and accordingly never did so at any time (A-32, A-33). The trooper then entered the car and conducted a further search, discovering on the floor in the front seat of the auto a manilla envelope stamped "Supergold" (A-19, A-20). The officer looked inside the envelope and saw a minute quantity of marijuana residue (A-20, A-36). A search of the rest of the auto's interior failed to turn up any evidence of burning marijuana; however, some butted cigarettes were found (A-44).

Trooper Nicot then formally apprised the defendants of their arrest, read them their *Miranda* rights, and again search each of them, this time thoroughly, for further evidence (A-20, A-21, A-36, A-40). After this was completed, Trooper Nicot then re-entered the parked vehicle (a two-door model) and conducted a further intensive search of not only its contents, but as well a particular item of personal clothing found on the back seat (A-21, A-41).

Lying in the middle of the back seat was a black leather jacket with four or six pockets (A-21, A-41). None of the defendants was within any reach of the jacket since they were all outside of the car and under arrest, nor was there any indication that this personal item of clothing contained a concealed weapon (A-48). Indeed, the trooper testified that he first patted it down, thus assuring himself that it contained no dangerous instrument hidden inside (A-42). Officer Nicot then picked the jacket up with one hand and thereby reduced it to his exclusive possession and control. He immediately unzipped and/or opened all of the pockets and while searching, discovered in one of the recesses two marijuana cigarettes (A-22, A-48, A-49). In another

zippered pocket, Trooper Nicot discovered a twenty dollar bill and upon unfolding the currency, saw a small quantity of white powder (A-21, A-41, A-49). The warrantless examination of the jacket also yielded a plastic bag containing white powder, and the personal medical insurance card of respondent (A-21, A-22, A-49). None of these items was visible until Nicot opened the pockets.

Based upon these findings, the trooper then further arrested all four defendants for illegal possession of suspected cocaine. Throughout this entire illegal search and seizure, the defendants were separated and outside of the two-door vehicle, unarmed and within the control and custody of an armed and trained New York State Trooper (A-32, A-33, A-48). The trooper radioed to his nearby barracks at Junius Ponds, New York, and requested that a magistrate be made immediately available for the arraignment of the four individuals on charges of unlawful possession of marijuana and illegal possession of a controlled substance (A-50, A-51). At no time was there a claim by Trooper Nicot nor other evidence that his own personal safety was in jeopardy, or that the defendants had been anything other than fully cooperative, or that they were in a position to deprive him of the exclusive custody and possession of the jacket which he had assumed by taking it into his hands (A-32, A-33).

The four defendants and the jacket were swiftly transported to the Town of Phelps court and brought before the Honorable Paul W. Adams (A-51). Respondent was presented with an information charging him with unlawful possession of marijuana in violation of Penal Law § 221.05 (A-51, A-52).[1]

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[1]Without the benefit of counsel, but after being informed that a fine would be imposed, a plea of guilty was entered to the marijuana offense (A-54).

Evidence on the cocaine charge, including the testimony of Trooper Nicot, was presented to the Ontario County grand jury (A-30). As a result, respondent was indicted on May 24, 1978 for criminal possession of a controlled substance in the fifth degree (A-3). The court denied respondent's motion to suppress the cocaine seized during the illegal search, and he subsequently pleaded guilty to attempted criminal possession of a controlled substance in the sixth degree (A-1, A-67). The court granted the defense motion for bail pending the determination of the appeal to the Appellate Division, Fourth Judicial Department of the Supreme Court of the State of New York (A-1, A-2, A-60).

The Decision of the Appellate Division

On May 22, 1979, the Appellate Division affirmed Roger Belton's conviction (A-69). Contrary to respondent's contention that none of the classical exceptions to the warrant requirement was applicable, the court nevertheless held that the search of the jacket found in the back seat of the automobile, outside the reach of all of the arrestees "was justified as a search incident to arrest . . ." (A-72). In reaching this decision, the Fourth Department overlooked the facts established at the hearing which clearly indicated that the jacket was not "ready to hand" such that respondent or his confederates could reach it to seize a weapon or destroy evidence, and that following the arrest of the four individuals by an armed trooper, the jacket was in the arresting officer's exclusive control, to wit, in his hands.

The Appellate Division also failed to follow *United States v. Chadwick,* 433 U.S. 1 (1977), and instead focused its attention on the inapplicable New York search-incident-to-

arrest case of *People v. DeSantis,* 46 N.Y.2d 82, 412 N.Y.S.2d 838 (1978), which involved the search of a briefcase taken from the hands of a defendant at the time of his arrest.

New York Court of Appeals Decision

Respondent's application for permission to appeal to New York's highest court was granted on June 27, 1979 (A-74). The conviction was reversed, the motion to suppress granted, and the indictment dismissed on June 5, 1980 when the Court of Appeals held that "[a] warrantless search of the zippered pockets of an unaccessible jacket may not be upheld as a search incident to a lawful arrest where there is no longer any danger that the arrestee or a confederate might gain access to the article" (A-77). Relying upon the record made in the trial court, the Court of Appeals rejected the justification of search incident to arrest, noting that "[o]nce defendant had been removed from the automobile and placed under arrest, a search of the interiors of a private receptacle safely within the exclusive custody and control of the police may not be upheld as incident to his arrest (*United States v. Chadwick,* 433 U.S. 1, *supra; Arkansas v. Sanders,* 442 U.S. 753, *supra*)" (A-80, A-81). In answer to the claims of the dissenting judges below and petitioner that at the time of arrest the arrestees could reach the jacket. the Court of Appeals emphasized that "the facts, as found at the suppression hearing and affirmed by the Appellate Division, were to the effect that the jacket was searched after the defendant was removed from the vehicle and then placed under arrest" (A-81, n.2).

Petitioner's writ of certiorari to the New York Court of Appeals was granted on January 19, 1981.

SUMMARY OF ARGUMENT

The proof at the suppression hearing established that a black leather jacket with zippered pockets was lying in the middle of the back seat of a two-door automobile, all the occupants of which (one of whom was respondent) had been arrested for marijuana possession, patted down by the arresting officer, and placed in the custody of this armed New York State Trooper who had more than twelve years police experience. The evidence was that from the time of their arrest, all of the defendants, each of whom was thoroughly searched, were standing outside of the stopped vehicle such that none of them could actually reach the jacket which was inside the car and thus outside of their immediate or instant control.

With the situation well in hand, the trooper went inside the car and physically took possession of the jacket by grasping it. A pat-down of the exterior of the jacket assured the officer that no weapon was concealed anywhere inside the recesses of this repository of personal articles. Nevertheless, in the absence of a warrant, the trooper unzipped the pockets of the jacket and uncovered a quantity of a substance which was revealed to be cocaine, wrapped in a twenty dollar bill.

This warrantless search of respondent's zippered jacket, in which he had an expectation of privacy, in the absence of exigent circumstances, while it was within the exclusive control of the police officer such that it could not be reached by any of the arrestees, and the seizure of contraband from its closed recesses violates the Fourth Amendment. The New York Court of Appeals, in reversing the judgment of conviction for criminal possession of a controlled substance and granting the motion to suppress, correctly held that the

warrantless search of the zippered pockets of the unaccessible jacket was not a search incident to a lawful arrest because it went outside of the boundaries established by this Court in *Chimel v. California,* 395 U.S. 752 (1969). Moreover, the State failed to meet its burden of establishing that respondent and his companions could reach the jacket to seize a weapon or destroy contraband and thus establish the search incident to arrest exception to the warrant requirement.

Furthermore, the New York Court of Appeals' proper ruling relied upon this Court's decisions in *Arkansas v. Sanders,* 442 U.S. 753 (1979); *United States v. Chadwick,* 433 U.S. 1 (1977); and *Chimel, supra,* which established that an arrestee's expectations of privacy in a receptacle outside of his immediate control are not vitiated merely by his arrest. Accordingly, the court below held that "[o]nce defendant had been removed from the automobile and placed under arrest, a search of the interiors of a private receptacle safely within the exclusive custody and control of the police may not be upheld as incident to his arrest . . ." (50 N.Y.2d at 452, 429 N.Y.S.2d at 577).

Petitioner urges that the actions of the police officer in searching the pockets of the jacket, even though they failed to establish that any of the arrestees could reach the garment, the pockets of which are commonly regarded as repositories of personal items, were justifiable as a search incident to arrest. There exists nothing on this record to indicate that the officer was in physical jeopardy nor that the evidence was in danger of being destroyed. In fact, not only did the trooper testify that there was no reason to draw his service revolver, his pat-down search of the jacket did not reveal a weapon-like object. Thus, in the absence of an articulable danger to the officer's safety or the integrity of the evidence, the

warrantless intrusion—which went beyond the traditional boundaries of a *Chimel* search incident to arrest—is wholly unjustified. Since the arrestees were in the armed officer's custody and outside of the reach of the jacket, which was in the officer's exclusive control, the New York Court of Appeals correctly applied the rules forged by this Court in *Chimel, Chadwick,* and *Sanders* to invalidate the warrantless search and seizure.

The United States maintains that the present search can be upheld even though it clearly went beyond that authorized as a legal search incident to arrest and is governed by this Court's decisions which prohibit searches of containers in which the arrestee has a reasonable expectation of privacy when the container is within the exclusive control of the arresting officer. Taking a position which would thoroughly undermine the holding in *Chimel, Chadwick,* and *Sanders,* in an attempt to return to the days when *United States v. Rabinowitz,* 339 U.S. 56 (1950), controlled, the Government argues that this search is permissible as part of the "arrest process" based upon some overlybroad finding that the container was in the "potential" reach of the arrestee, even if it was outside of his actual reach. Such a rule would make warrantless searches the rule rather than the exception.

The facts are uncontroverted that the arrest in this case was complete and the arrestees were in the custody and control of an armed trooper, who indeed, viewed the situation as so secure and neutralized that there was no reason for him to even draw his service revolver. Thus, even if the Government's untenable analysis was applied to the circumstances of this case, the search of the jacket pockets could not be upheld. More importantly, however, by arguing for the adoption of such a rule, the Government urges that all warrantless searches—even of private containers outside the

arrestee's immediate control—are justifiable as intrusions no more significant than those which attend the search of the person incident to arrest (*United States v. Robinson*, 414 U.S. 218 [1973]). The sanctioning of such a rule would render meaningless the holdings of *Chimel*, *Chadwick*, and *Sanders* which are correctly applied to the facts of this case.

Respondent and his companions were outside of the vehicle, arrested and in the custody of an armed state trooper who personally viewed the situation as nonexigent as demonstrated by his actions and statements; the jacket was outside of the defendants' immediate control and exclusively in that of the officer's from the time of the initial arrest. Thus, notwithstanding the valid arrest and search of his person, respondent nevertheless maintained a privacy interest in the zippered pockets of his jacket such that the warrantless entry into its closed recesses violated his Fourth Amendment rights as construed by this Court in *Chimel*, *Chadwick*, and *Sanders*.

ARGUMENT

I.

THE WARRANTLESS SEARCH OF RESPONDENT'S ZIPPERED JACKET IN THE ABSENCE OF EXIGENT CIRCUMSTANCES, WHILE IT WAS WITHIN THE EXCLUSIVE CONTROL OF THE POLICE (AND OUTSIDE OF RESPONDENT'S REACH) AND THE SEIZURE OF CONTRABAND FROM ITS ZIPPERED RECESSES VIOLATES THE FOURTH AMENDMENT, AS CORRECTLY HELD BY THE NEW YORK COURT OF APPEALS WHICH SUPPRESSED THE EVIDENCE AND DISMISSED THE INDICTMENT.

Since this Court's decision in *Arkansas v. Sanders,* 442 U.S. 753 (1979), many appellate tribunals have had occasion to consider whether warrantless searches of various types of "containers" and the seizures of items therefrom were violative of defendants' Fourth Amendment rights. In each instance, the inquiry necessarily focused upon (1) whether the arresting officer had reduced the container or receptacle to his exclusive control such that there was no danger that the arrestee or a confederate could reach the container to seize a weapon or destroy contraband; and (2) whether the arrestee could legitimately expect the contents of the receptacle to remain private and undisclosed to public view. In accordance with the principles enunciated in *United States v. Chadwick,* 433 U.S. 1 (1977), and *Sanders, supra,* the New York Court of Appeals correctly held that:

> "A warrantless search of the zippered pockets of an unaccessible jacket may not be upheld as a search

incident to a lawful arrest where there is no danger that the arrestee or a confederate might gain access to the article.

* * *

"That defendant retained an expectation of privacy in the contents of his jacket pockets notwithstanding the fact of his arrest is beyond dispute. Indeed, it is difficult to imagine a more private receptacle where one might place one's most personal items than the zippered recesses of a jacket. . . . *Once defendant had been removed from the automobile and placed under arrest, a search of the interiors of a private receptacle safely within the exclusive custody and control of the police may not be upheld as incident to his arrest* [citing *Chadwick* and *Sanders*]. The car was in a secure place where it could have been easily guarded, its occupants under arrest and safely away from the vehicle, their removal to the police station imminent. There was, therefore, no reason why the search should not have awaited the issuance of a warrant" (*People v. Belton*, 50 N.Y.2d 447, 449, 452, 429 N.Y.S.2d 574, 575-577 [1980]; emphasis supplied).

A brief review of *Sanders* and *Chadwick* confirms that New York's highest court was correct in ruling that the search of respondent's jacket—which was in the exclusive control of the trooper[2] who had already assured himself that it contained no weapons or other dangerous instrumentality—and the seizure of material from its closed recesses, in the absence of a warrant, was violative of respondent's constitutional rights.

[2]Since the jacket was in the trooper's exclusive control at all times following the arrest, it was necessarily outside of the immediate control of the arrestees; based on the testimony here, one is the converse of the other. Thus, there was no exigency mandating immediate search of the jacket. *Chimel v. California*, 395 U.S. 752 (1969).

The New York Court of Appeals further correctly declined to treat the search as one incident to arrest since the intrusion went far beyond the narrow limits established by this Court in *Chimel v. California,* 395 U.S. 752 (1969). Moreover, the State never met its burden of proving facts which would support such an exception to the warrant requirement (A-81, n.2). The Court of Appeals authoritatively construed the decisions of this Court and its own prior rulings and held as a matter of law that the District Attorney simply failed to demonstrate that the jacket was within the area of immediate control of any of the arrestees. Thus, upon these facts, the court below properly ruled that the search was not one incident to arrest.

The record established that from the time of the arrest, the jacket was in the exclusive control of the officer and therefore outside of the reach of respondent and his companions. Any argument advanced by the State based upon a claim of danger to the arresting officer in this case is wholly without merit for the officer's own testimony reveals that he did not treat the situation as exigent. Not only is the record barren of facts necessary to find a basis for a legal search incident to arrest—the jacket being entirely outside of the area of control of the arrestees while at the same time in the control of Trooper Nicot—the officer was so secure and unthreatened that he never felt the need to even draw his service revolver (A-32, A-33). Thus, the State's contention that the warrantless search was justifiable to protect the officer under the exception of a search incident to arrest cannot withstand even the mildest scrutiny because it is wholly unsupported by the record.

Respondent agrees with petitioner's analysis only to the extent that "each case must be examined with an eye toward its own particular facts . . ." (Petitioner's Brief at 17).

However, petitioner's proposed new rule, to supplement those already existing in *Chimel, Chadwick,* and *Sanders,* which would set forth specifically the extent of permissible search based upon "the number of participants and the degree of restraint, if any, imposed upon the arrestees" (Petitioner's Brief, *supra*), is unworkable. No such rigid rule, designed apparently simply to make it easier for the police to seize evidence at the expense of constitutional safeguards, is possible because there are incalculable variables which attend every arrest, search and seizure. The guidelines previously forged by this Court, however, are more than adequate to preserve the officer's safety and the arrestee's freedom from intrusive warrantless searches and seizures and should not be scrapped or emasculated simply to bypass the procedures necessary to lawfully acquire evidence.[3]

Nor can serious consideration be given to the recommendation of the Government (Brief for the United States at 26), which would unconstitutionally broaden the scope of warrantless searches incident to arrest. The United States would permit the search of every conceivable type of receptacle based upon some simplistic finding that the search of the receptacle was some nebulous "part of the arrest process", regardless of the arrestee's expectation of privacy or the degree of control exercised by the officer over the arrestee and the container making it impossible for the arrestee to reach the container. Indeed, the rule proposed by the Government would render meaningless the *Chimel-Chadwick-Sanders* trilogy and would constitute a regression to the now discredited rule once enunciated by this

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[3]In *Sanders,* Chief Justice Burger and Justice Stevens recognized that "We are construing the Constitution, not writing a statute or a manual for law enforcement officers" (442 U.S. at 768) (Burger, CJ. & Stevens, J, concurring).

Court in *United States v. Rabinowitz*, 339 U.S. 56 (1950). The Government urges that once an individual is arrested, not only are all his privacy rights vitiated with respect to items secreted on his person owing to the intrusive nature of the arrest itself (*United States v. Robinson*, 414 U.S. 218 [1973]), but that this diminished expectation of privacy should have no boundaries and therefore be extended to areas and containers within the "potential" reach of the arrestee—even if these receptacles are actually outside of the arrestee's reach and in the officer's exclusive control such that they would not be subject to search under the *Chimel* rule, which overruled the questionable holding of *Rabinowitz*.

Any such rule which would permit the search of containers not immediately associated with the person but all those receptacles "potentially" within the arrestee's reach, would effectively extinguish the *Chadwick-Sanders* right to privacy in receptacles seized by the officer and in his exclusive control, which right exists whether the search is remote in time and place (*Chadwick*) or spacially and temporally at one with the arrest (*Sanders, supra*, at 762). In fact, under such an ill-advised rule, it would be difficult to imagine any arrest situation in which the warrant requirement would be operative.

Moreover, both petitioner and the United States have strayed from the facts of this record, since they attempt to create an impression not supported by the trial court evidence that exigent circumstances arose out of the arrest of respondent and his companions. Indeed, the facts are quite to the contrary.[4] More importantly, not only was the

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[4]Although he was armed, the trooper never felt the need to draw his service revolver (A-32, A-33). Prior to searching the jacket, he had patted each defendant down, then placed them under arrest, separated them, subjected them to a full-blown search, then patted the jacket down, thoroughly satisfying himself that no weapons were present. Thus, the actions of the arresting officer were not those of one who perceived the situation as exigent.

warrantless seizure not justifiable by *Robinson, supra,* or *Draper v. United States,* 358 U.S. 307 (1959), the search clearly went beyond that permissible under *Chimel* in that the jacket that was searched was outside of the area from which it could have been reached by respondent or his companions, as most vividly demonstrated by the fact that it was in the immediate, exclusive possession and control of Trooper Nicot at the time it was searched since as he stated, the jacket was securely in his hands. Thus, any attempt by petitioner or the Government to justify this illegal intrusion into respondent's private jacket pockets on grounds of search incident to arrest must fail. Furthermore, the adoption of the Government's rule would violate the reasonable privacy interests which arrestees possess in containers seized by police and which are in the arresting authorities' exclusive control contrary to the spirit and letter of *Chimel, Chadwick,* and *Sanders.*

A review of the recent applications of *Sanders* and *Chadwick* confirms that the refusals of other courts to uphold searches of "containers" in which the arrestee had an expectation of privacy as incident to arrest when the arrestee could not reach the container are in line with New York's decision and the body of law honed by this Court. A brief review of *Chadwick* and *Sanders* establishes their applicability to this case, which, contrary to the arguments of both opponents, is not one involving a search incident to arrest, but rather is concerned with an arrestee's privacy expectations in the absence of exigent circumstances.

In *Chadwick, supra,* federal agents seized a footlocker from defendant's automobile and while it was within the government's exclusive possession and control, searched it, discovering large amounts of marijuana. This Court granted certiorari and in an opinion written by Chief Justice Burger,

affirmed the suppression orders entered below, stating:

> "In this case, important Fourth Amendment privacy interests were at stake. By placing personal effects inside a double-locked footlocker, respondents manifested an expectation that the contents would remain free from public examination. No less than one who locks the doors of his home against intruders, one who safeguards his personal possessions in this manner is due the protection of the Fourth Amendment Warrant Clause. There being no exigency, it was unreasonable for the Government to conduct this search without the safeguards a judicial warrant provides" (433 U.S. at 11).

Rejecting the Government's argument that the search was justifiable as one incident to a lawful arrest, this Court stated:

> "[W]arrantless searches of luggage or other property seized at the time of an arrest cannot be justified as incident to that arrest either if the 'search is remote in time or place from the arrest,' *Preston v. United States*, 376 U.S., at 367, 84 S.Ct., at 883, *or no exigency exists.* Once law enforcement officers have reduced luggage or *other personal property not immediately associated with the person of the arrestee* to their exclusive control, and there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer an incident of the arrest" (*Id.* at 15; emphasis supplied).

The facts in the more recently decided *Sanders* case do not differ significantly from those in *Chadwick.*[5] In

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[5]That the search in *Chadwick* was removed in time and place while the search in *Sanders* was contemporaneous is not a significant difference, for in both cases the police had exclusive control of the receptacle from the moment of the arrest such that its subsequent search was not incident to arrest. *See Sanders, supra,* at 762. *See also Chimel, supra.*

Sanders, the Little Rock, Arkansas Police Department had been told by a reliable informant that the defendant would be arriving at a *certain time* aboard a specific flight and would be carrying a green suitcase containing marijuana (442 U.S. at 753). As predicted, the individual disembarked at the appointed time and retrieved from the baggage area a green suitcase matching the supplied description (*Id.*). After having seen him place the suitcase in the trunk of a taxi, police pursued the departing auto and stopped it several blocks from the airport (*Id.*). The driver opened the trunk and revealed the green suitcase. Without asking permission of the defendant or his companion, the police opened the unlocked suitcase and discovered marijuana (*Id.*).

The trial court denied the defendant's suppression motion and he thereafter was convicted of possession of marijuana with intent to deliver (*Id.* at 756). The Arkansas Supreme Court reversed the conviction, ruling that the marijuana should have been suppressed because it was obtained through an unlawful search of the suitcase. The state's highest court found that although there was probable cause for the officers' belief that contraband was contained in the suitcase, there were no exigent circumstances justifying the failture to obtain a warrant, citing *United States v. Chadwick, supra; Coolidge v. New Hampshire,* 403 U.S. 443 (1971) (*Id.*).

Noting that this was the first occasion "to rule on the constitutionality of a warrantless search of luggage taken from an automobile lawfully stopped" (*Id.*), this Court held:

> "[T]he warrant requirement of the Fourth Amendment applies to personal luggage taken from an automobile to the same degree it applies to such luggage in other locations. Thus, insofar as the police are entitled to search such luggage without a warrant, their actions

> must be justified under some exception to the warrant requirement other than that applicable to automobiles stopped on the highway. Where—as in the present case—the police, without endangering themselves or risking loss of the evidence, lawfully have detained one suspected or criminal activity and secured his suitcase, they should delay the search thereof until after judicial approval has been obtained. In this way, constitutional rights of suspects to prior judicial review of searches will be fully protected" (*Id.* at 766).[6]

Just as the defendant in *Sanders* was entitled to the protection of the Warrants Clause and the evaluation of a neutral magistrate before his privacy interests in the contents of the suitcase were invaded so, too, was respondent entitled to this protection before his expectation of privacy in the zippered recesses of his jacket was overcome. "The mere reasonableness of a search, assessed in the light of the surrounding circumstances, is not a substitute for the judicial warrant required under the Fourth Amendment" (442 U.S. at 758). Recent rulings by federal courts of appeal, suppressing evidence seized under circumstances remarkably similar

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[6]It is clear that this Court did not intend the safeguards of *Sanders* to apply solely to items of *luggage* found in an automobile lawfully stopped. This fact is evident in the statement that "[n]ot all containers and packages found by police during the course of a search will deserve the full protection of the Fourth Amendment" (*Id.* at 764 n.13). In our case, however, there exists no problem of classification, for the nature of a multi-zippered jacket is such that it was intended to serve as a repository for various items and that any article therein placed was expected to be kept private. Indeed, what could be more private than one's own pockets! Even the Government agrees that the pockets of a jacket constitute a container in which one possesses a reasonable expectation of privacy (Brief for the United States at 10, 20).

to those of our case, support respondent's reliance on the correctness of the New York Court of Appeals decision, which in turn relied upon *Sanders.*

For example, in United States v. Benson, 631 F.2d 1336 (8th Cir. 1980), *petition for cert. filed,* 49 U.S.L.W. 3753 (U.S. Feb. 4, 1981) (No. 80-1317), state narcotics investigators had probable cause to arrest Benson for possession of cocaine. Immediately prior to his arrest, Benson was seated in the front passenger seat of a four-door compact station wagon and his brown leather tote bag was resting on the passenger side of the back seat.[7] Upon being arrested, Benson was physically removed from the vehicle by the officer and placed in a search position with his hands on top of the automobile. At the same time, another officer seized the tote bag from the back seat and opened it to discover a small blue drawstring bag bearing the words "Rich Lights". The officer determined by feel that the bag held a soft, powdery substance and upon looking inside, found a plastic bag containing a substance later determined to be cocaine.

In reversing Benson's conviction of possession with intent to distribute and conspiracy to distribute cocaine, the Eight Circuit relied upon its prior decisions in *United States v. Schleis,* 582 F.2d 1166 (8th Cir. 1978), and *United States v. Stevie,* 582 F.2d 1175 (8th Cir. 1978), *cert. denied,* 443 U.S. 911 (1979), as well as *Sanders, supra,* when it held that the defendant had a legitimate expectation of privacy in the tote bag and further that:

> "[T]he officers should have obtained a warrant before searching the tote bag. The bag was not 'immediately

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[7]A police informant was situated in the driver's seat. The car was located in an airport parking lot.

> associated with the person of the arrestee,' . . . either at the time the luggage was seized or at the time it was searched. *At the time the tote bag was seized, Benson was seated in the front seat of the vehicle and the bag was in the back seat.* . . . The bag was clearly under Officer Hutchinson's exclusive control at the time he opened and search it, and there was no longer any danger that Benson might gain access to the bag to destroy evidence or grab a weapon. . . . [T]here is no allegation that the bag held 'instrumentalities which could be dangerous even when sitting idly in the police locker.' [citations omitted] Once the police officers seized the bag and exercised exclusive control over it, they should have delayed searching it until judicial approval had been obtained" (631 F.2d at 1340; emphasis supplied).

As the above description of the facts indicates, the circumstances of the search in *Benson, supra,* are remarkably similar, however, less compelling than those in the instant case where neither respondent nor his companions was even in the vehicle at the time of the search.

United States v. Rigales, 630 F.2d 364 (5th Cir. 1980), provides a further illustration of a correct application of the *Sanders* holding to facts similar to those at bar. There the defendant-driver of a car in which two men and two women were passengers, was arrested for crossing a dirt median and for displaying dealer plates. After a thorough pat-down of all the passengers revealed nothing, the officer shined a flashlight into the automobile. There was illuminated on the floorboard of the front seat a zippered 12" x 14" x 2-1/2" case of leather or simulated leather with a bulge. The officer suspected the case contained a gun and when he picked it up, he found it very heavy. Without any further investigation, the

officer opened the case to discover a loaded pistol. In condemning the search, the Fifth Circuit wrote:

> "After a close examination of the record, we find that the instant case is controlled by *Sanders*. The government conceded at oral argument that Officer Lopez could easily have taken the zipped case to the police station and secured a warrant from a magistrate. In our view, this is tantamount to an admission that no exigent circumstances existed to justify the warrantless search. Officer Lopez' testimony supports this view. *He testified that he had asked all the occupants of the automobile to step outside the vehicle and had patted them down; there is no indication that the case was within the reach or control of the defendant or any of the passengers.* . . . Assessing 'the exigency of mobility' at the point immediately before the search, as we are required to do by *Sanders,* 442 U.S. at 763, . . . we conclude that the government has failed to carry its burden of demonstrating that exigent circumstances existed to justify a warrantless search of the zippered case" (630 F.2d at 367; emphasis supplied).

See also United States v. Montano, 613 F.2d 147 (6th Cir. 1980), unlawful search of suitcase in defendant's motel room in presence of arrestees; *United States v. Ross,* 27 Crim.L.Rptr. 2169 (D.C. Cir. Apr. 17, 1980), illegal search of leather pouch found in car trunk while arrestee was outside of car in custody of officers; *United States v. Miller,* 608 F.2d 1089 (5th Cir. 1979), *cert. denied,* 100 S.Ct. 3020 (1980), search of contents of portfolio found in automobile while passenger was still present in vehicle not compatible with Fourth Amendment; *People v. Robbins,* 103 Cal.App. 3d 34, 162 Cal.Rptr. 780 (1980), *cert. granted,* 49 U.S.L.W. 3515 (U.S. Jan. 19, 1981) (No. 80-148), cookie tin and tote bag found in passenger and luggage compartments respectively, while arrestee was outside of car,

conceded to be closed containers for which warrants were required.

The facts and circumstances of our case bring it squarely within the logic of *Sanders, Benson,* and *Rigales.* Once respondent was arrested for marijuana possession, any arguable exigency ceased, since under the circumstances, at that point in time, all of the travelers were in custody, had been thoroughly searched, the inner portion of the vehicle proper had been searched and the jacket, once patted down, was actually in the hand of the police officer, and thus, in his exclusive possession and "immediately associated" with the person of the police and not of the arrestees. The arrest process was thus completed, and the prisoners were at that point simply to be transported to the waiting magistrate. The obviously portable jacket not only could have been easily secured, as were the trunk in *Chadwick,* the suitcase in *Sanders,* the tote bag in *Benson,* and the leather case in *Rigales,* but was in fact secured by Trooper Nicot who took it with him to the magistrate in his vehicle. A warrant application could have been made to the arraigning justice before whom the defendants were to be shortly brought.[8]

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[8]That the four defendants were to be transported to the trooper substation and were to be arraigned before a magistrate is foregone by several events which occurred before the alleged cocaine was even discovered: (1) the driver was arrested for substantially exceeding the speed limit (A-13, A-42); (2) all occupants of the vehicle were from out-of-town; (3) the vehicle was registered to a woman to whom none of the occupants was related (A-17); (4) the driver presented to the officer the license of another individual not present in the vehicle (A-18, A-32); (5) all of the passengers according to the trooper were placed under arrest as soon as they exited the vehicle (A-18, A-19); (6) each passenger was given is custodial rights under *Miranda* as soon as the marijuana was discovered (A-21); (7) the arresting officer acknowledged that once the marijuana was discovered, all occupants were in custody and were going to be brought before the court (A-18–A-21, A-42, A-43, A-48).

There was no compelling need for the trooper to have examined in *any way* the private interiors of the jacket in the absenc eof a warrant, especially since the jacket (1) was totally outside of the reach of the four arrestees, (2) was in the trooper's exclusive control, i.e. his hands, and (3) had been patted down by the officer and was found to contain no weapon or dangerous instrumentality.[9]

Indeed, the lacke of exigency is underscored by the fact that Trooper Nicot actually took possession of the jacket at the scene and brought it to the courthouse. There he could have easily detailed any existing reasons which he felt established the requisite probable cause necessary to obtain a warrant to open the pockets and seize any items therein. It would then be left to the discretion of a neutral magistrate to determine objectively whether the trooper had presented facts amounting to probable cause to believe the jacket contained contraband.[10] Since these procedures could easily have been implemented, but were not, it is apparent that the search of the jacket without a warrant was in violation of respondent's Fourth Amendment rights and was therefore unreasonable.

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[9]As the Court of Appeals stressed, "[o]ne searches the record in vain for support of the dissenter's claim that at the time of arrest—the point from which the predicate for the warrantless search is measured—'the jackets were within the reach of the four suspects and had not yet been reduced to the exclusive control of the officer' (dissenting opn [A-83])" (A-81, n.2). To be legally justified, the exception of a warrantless search incident to arrest must be founded on evidence that the jacket was within the immediate control of the arrestees. The record in this case clearly refutes that assertion.

[10]This Court in *Sanders*, quoting from *Coolidge v. New Hampshire*, 403 U.S. 443, 481 (1971), noted that the "warrant requirement is not an inconvenience to be somehow 'weighed' against the claims of police efficiency" (442 U.S. at 758).

CLAIMS OF PETITIONER

As noted above, petitioner's entire argument basically parrots the unsupported views of the two dissenting justices in the court below that the arresting officer was in some form of immediate danger not disclosed by the record. Petitioner certainly did not meet its burden of demonstrating that the warrantless search of a private container outside of the arrestees' reach was justifiable on the basis of physical jeopardy to the trooper. The fact that, following the arrest, none of the arrestees could reach the receptacle militates against such a finding of exigency. Moreover, such a determination was not made because the trooper plainly stated that he subjected each of the passengers to a thorough search, patted the jacket down and discovered no weapons, and accordingly, found no reason to even unholster his service revolver. Thus the warrantless search of respondent's jacket cannot be sustained as one incident to arrest. *Chimel, supra.* Further, the authorities relied upon by petitioner involve cases where warrantless searches were upheld in wholly disparate factual situations.

For example, *United States v. Fontecha,* 576 F.2d 601 (5th Cir. 1978), was decided prior to *Sanders* and involves entirely different principles tied to searches conducted at borders. Similarly, in *United States v. Foster,* 584 F.2d 997 (D.C. Cir.), *cert. denied,* 439 U.S. 1006 (1978), a police officer, who was suspicious of the actions of three passengers in the handling of a folded grocery bag, touched the bag and feeling a weapon, was justified in opening the container—not one in which one could maintain a reasonable expectation of privacy.

A comparable situation existed in *United States v. Wilkerson,* 598 F.2d 621 (D.C. Cir. 1978), where after the

appellant-passenger had alighted from the vehicle at the officer's request, the officer reached into the front seat and placed his hand on a coat, pressed it and felt something like a shotgun. This coupled with the fact that none of the passengers had been searched or placed under arrest, clearly distinguishes this case from our own.

In *United States v. Agostino,* 608 F.2d 1035 (5th Cir. 1979), the court upheld the warrantless seizure because the contraband was in plain view, or in the alternative, because it was located within the reach of the defendant-driver. In our case, there was *no* finding that following the arrest the jacket, lying in the middle of the back seat of a two-door vehicle, was accessible to any of the four arrestees, all of whom were standing outside of the automobile in the custody of an armed state trooper. In fact, as the Court of Appeals noted, the jacket in this case was not accessible to respondent or any of his confederates. *See People v. Belton,* 50 N.Y.2d 447, 452 n.2 (1980). In *United States v. Ajlouny,* 476 F.Supp. 995 (E.D.N.Y. 1979), the searched briefcase was within the defendant's immediate control as it was only a few feet from him as he sat in the driver's seat of his car. *United States v. Ocampo,* 492 F.Supp. 1211 (E.D.N.Y. 1980), is similarly unpersuasive because the open and unsecured bag, in which the defendant could have no reasonable expectation of privacy, was within the "grabbable" range of the defendant who was merely within arm's length of it.

Factual situations relied upon by petitioner are vastly different from those about which we are concerned where none of the arrestees was within reaching distance of respondent's jacket which had been secured by Trooper Nicot's grasp. Similarly, respondent's claims to a privacy interest in his jacket pockets are not "misplaced" (Petitioner's Brief at 24) because, as noted above, pockets are a

respository of one's most personal items. Further, the language quoted by petitioners from *United Sttes v. Goshorn,* 628 F.2d 697 (1st Cir. 1980), is misleading because that case held that it is not *reasonable* to expect privacy in the plastic bags there—a vasly different container than the zippered pockets of a jacket searched here.[11]

Petitioner in essence requests this Court to set forth a static formula to be applied to fluctuating factual situations. It urges this Court to hold that no warrantless search of a private container and seizure of evidence from this receptacle when it is outside of the defendant's immediate area and thus

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[11]Nor do the state authorities relied upon by petitioner support its claim that the Court of Appeals' decision is incorrect. For example, in *State v. Hunter,* 261 S.E.2d 189 (N.C. 1980), the police had probable cause to believe that the defendant had just committed the crime of rape at gunpoint. In *Hunter,* unlike here, there existed probable cause to believ ethat a gun was present in the vehicle in which the defendant had allegedly just committed a violent crime, thus supporting a different exception to the warrant requirement (*Chambers v. Maroney,* 399 U.S. 42 [1970]). *See also Banks v. State,* 246 Ga. 178, 269 S.E.2d 450 (1980), where police had probable cause to believe that defendant possessed the weapon with which he allegedly committed murder and aggravated assault and had patted down a shirt from which the gun fell out. The situations of an alleged rapist and an alleged murderer whom the police had probable cause to believe were armed are vastly different from that presented by our case where respondent and his companions were arrested for possession of a quantity of marijuana so small it did not even amount to a crime. In *State v. Wilkens,* 354 So.2d 934 (La. 1978), a syringe discovered on the floor of the auto, directly below where the defendant stood, was within the "grabbable" range of the defendant, as well as within the plain view of the officer. In our case, however, the discovery of the cocaine within the *zippered* pockets of a black leather jacket in the back seat of a car, while respondent and his confederates were outside of the vehicle, cannot be said to have been within their immediate control or in plain view. Accordingly, *Hunter, Banks,* and *Wilkens* do not present any authority for this Court to disturb the decision of the New York Court of Appeals.

within the officer's exclusive control is illegal unless there are "x" number of police officers per "y" number of defendants, and "z" number of sets of handcuffs, etc. No such formula is possible, however, because every confrontation between a citizen and police is different and expands or contracts the degree of warrantless evidence acquisition which is constitutionally tolerable. The necessary flexibility needed to deal with such diverse factual situations is reflected by the highly workable standards fashioned by this Court in *Chimel, Chadwick,* and *Sanders.*[12]

ARGUMENTS OF THE GOVERNMENT

As indicated *supra,* the United States has chosen not to align itself with petitioner's argument and, in fact, maintains that considerations such as the number of arresting officers per suspects; the place of arrest; the nature of the container; and the suspect's position with respect to the receptacle are *irrelevant.* The Government's only inquiry would be "whether or not the search was undertaken as part of the arrest process" (Brief for the United States at 26). If so, the Government claims that the privacy expectation one has in containers would be subsumed by the privacy breach caused by the initial arrest as in the case of the search of the person incident to arrest. *See United States v. Robinson,* 414 U.S. 218 (1973).

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[12]That under these rules different results will occur in different factual situations, *see e.g., State v. Cripps,* 582 P.2d 312 (Mont. 1978), *State v. Blanchard,* 374 So.2d 1248 (la. 1978), *State v. Robalewski,* 418 A.2d 817 (R.I. 1980) (Petitioner's Brief at 17), does not render the decision of the New York Court of Appeals incorrect but merely points out the necessary flexibility a constitutional standard must have in orde to accommodate a number of diverse factual settings while at the same time maintaining an overall common understanding of applicability.

Leaving aside for the moment that the dimensions and boundaries of this nebulous "arrest process" concept are significantly more difficult to determine than are the *Chimel* and *Sanders* rules to apply, we are faced with the prospect of the creation of a limitless "zone of search license" which would render nullities this Court's decisions in *Payton v. New York,* 445 U.S. 573 (1980), *Sanders, Chadwick* and *Chimel.* Moreover, the exceptions to the Fourth Amendment's warrant requirement which have been refined by this Court, whose decisions have in turn been relied upon by countless other judicial tribunals, would be expanded such that the Fourth Amendment's prohibition against warrantless searches and seizures would be rendered meaningless once the so-called "arrest process" suggested by the Government began, regardless of exigencies, proximity to or control by individuals of "containers", etc. Thus, the law in this regard would return to the state embodied by decisions such as *Rabinowitz* which was soundly criticized by this Court more than ten years ago in *Chimel.*

This radical approach would require this Court to drastically overhaul the entire body of law reflected by *Sanders* and *Chimel.* Furthermore, none of the decisions cited by the United States even remotely suggests that if the "arrest process" is not "complete", the police possess carte blanche to search not only the arrestee's peson, but his car, the room or rooms in his house occupied at the time of his arrest, and the most secure recesses of any and all containers or receptacles that may be located within the arrestee's "potential" control, regardless of the exclusivity of control exercised by the police over the searched article, preventing an arrestee from grabbing a weapon or destroying evidence, and the arrestee's expectation of privacy in the receptacle searched.

Five of the eight cases cited by the Government in support of a contemporaneous search of containers whether or not they are in the grabbable reach of immediate control of the suspect at the time of arrest (Brief for the United States at 17, fn.7), were decided prior to this Court's pronouncements in *Chadwick* and *Sanders*. They therefore fail to reconcile the principles established by these now controlling authorities. In *United States v. Dixon*, 558 F.2d 919 (9th Cir. 1977), *cert. denied*, 434 U.S. 1063 (1978), the court upheld the seizure of a revolver from the inside of a brown paper bag. This case[13] is distinguishable from the instant case because one cannot be said to have a reasonable expectation of privacy in a brown bag, whereas an individual should reasonably expect that articles which he places in the pockets of his jacket (especially those which are zippered) will remain free from public scrutiny. A further distinction can be seen in *United States v. Garcia*, 605 F.2d 349 (7th Cri. 1979), *cert. denied*, 446 U.S. 984 (1980), where the suitcase whose search was sustained was found ready-to-hand and within the immediate control of the defendant and an as-yet-unidentified accomplice in a busy airport, unlike the jacket here which was in the middle of the back seat of a two-door vehicle while the arrestees, who were completely outside of the vehicle, were in the custody of an armed trooper. Finally, in *United States v. Graham*, 28 Crim.L. Rptr. 2528 (7th Cir. Jan. 27, 1981), the court sustained the search of a shoulder bag, appended to the arrestee's body, pursuant to a warrant authorizing the search of his person. Not only was there no warrant in the present case, the jacket which was illegally invaded was not at all near respondent or

[13]Although *Chadwick* had been decided barely a month before, there is no indication that its principles were raised or considered by the Court.

his companions, who were in the custody and control of the arresting officer.

Contrary to the contention of the United Sttes, the factors of the degree of control exercised by the officer over the container, the probability of the arrestee's reaching the receptacle, and his expectation of privacy therein are not "hairline distinctions" (Brief for the United States at 24), but are precisely the circumstances which this Court has employed to decide whether limited exceptions will be made to the strict warrant requirement of the Fourth Amendment when "containers" as opposed to the person are sought to be searched incident to arrest. Indeed, these considerations are the foundation of this Court's decisions in *Chimel* and *Sanders*. Under the Government's proposed scheme, factors such as whether the arrestee is located outside of the vehicle and the container inside away from his reach; whether the arrestee is under arrest and in custody; whether the container is in the hands of the authorities and thus under their exclusive control would be of no moment. The United Sttes would sanction a search and seizure in each of these situations as long as the so-called "arrest process' was "continuing", presumably up until after the arrestee has been booked and locked into a cell.

Such a concept would expand beyond all tolerable limits the very narrow exception created by this Court in *Chimel* and aswell invalidate the holdings in *Chadwick, Sanders,* and other decisions based upon the same principles, where the lack of exigency as typified by the exclusive control of private containers by the police was given controlling consideration. The net result of the rule lobbied for by the Government would be to permit the intrusion into any type of container regardless of exigencies, or the arrestee's reasonable expectation of privacy as long as it was preceded

by an arrest. Indeed, under the Government's view, warrantless searches would become the rule rather than the exception.

Contrary to the Government's reading of the opinion, there is nothing in the New York Court of Appeals decision which could in any way be interpreted as questioning the legality of a legitimate search incident to arrest if, from the specific circumstances, the item seized was clearly within the "grabbable" area of the arrestee. The decision below is predicated not only upon the fact that the trooper had "exclusive control" of the jacket at the time he opened its zippered recesses but also that the State failed to prove that *the jacket was therefore within the immediate control or reach* of respondent or his companions, such that its search was incident to their arrest.

Quite another question would be presented if respondent actually had been wearing the jacket at the time of his arrest. Although *United States v. Robinson,* 414 U.S. 218 (1973), held that an item seized from the person of the arrestee during a search incident to a custodial arrest is admissible into evidence, such is not the case when the intrusion is extended beyond the arrestee to private possessions not immediately associated with his person as in the case at bar.[14] Thus, any attempt to analogize *robinson* to our case is

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[14]Moreover, New York's highest court has chosen to adopt a stricter code of constitutional protections for its citizens than that required in *United States v. Robinson, supra. See, e.g., People v. Weintraub,* 35 N.Y.2d 351, 320 N.E.2d 636, 361 N.Y.S.2d 897 (1974). *See also Lego v. Twomey,* 404 U.S. 477, 489 (1972). In *Cooper v. Marin,* 49 N.Y.2d 69, 399 N.E.2d 1188, 424 N.Y.S.2d 168 (1979), *cert. denied sub nom. Lombard v. Cooper,* 100 S.Ct. 2965 (1980). The New York Court of Appeals recognized:

"We have not hesitated when we concluded that the Federal Constitution as interpreted by the Supreme Court fell short of

(continued)

doomed to failure because of the extreme disparity in their facts and the marked distinction in privacy interests at stake. Moreover, it is respondent's contention that the decision below was decided correctly and is in complete accord with the principles enunciated in *Chimel, Chadwick,* and *Sanders* and that any application of some ambiguous "arrest process' analysis is in direct defiance of the limited exceptions to the Fourth Amendment warrant requirement created by this Court. A return to *Rabinowitz* by adopting the Government's suggested extension of the *Robinson* doctrine would clearly be at war with the modern teachings of this Court expressed in *Chimel, Chandwick, Sanders, Payton* and numerous other well-reasoned decisions.

CONCLUSION

Today, more than any other time in our history, liberty is being imperiled for the sake of order. If there is a danger from those who would violate our laws, there is also a danger from the law abiding who, in an excess of anxiety, may jeopardize ourindividual liberties with a view to enforcing the law. In one sense the safety of the community may be endangered by

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(footnote continued from preceding page)

adequate protection of our citizens to rely upon the principle that that document defines the minimum level of individual rights and leaves the States free to provide greater rights for its citizens through its Constitution, statutes or rule making authority (*Sharrock v. Dell Buick-Cadillac,* 45 N.Y.2d 152, 159-161, 408 N.Y.S.2d 39, 43-45, 379 N.E.2d 1169, 1173-1174; *People v. Isaacson,* 44 N.Y.2d 511, 519-520, 406 N.Y.S.2d 714, 718-719, 378 N.E.2d 78, 81-83; *People v. Hobson,* 39 N.Y.2d 479, 483-484, 384 N.Y.S.2d 419, 421-422, 348 N.E.2d 894, 897-898; *People v. Arthur,* 22 N.Y.2d 325, 328-329, 292 N.Y.S.2d 663, 665-666, 239 N.E.2d 537, 538-539. . ." (*Id.* at 79, 424 N.Y.S.2d at 174).

restricting the power of the police to arrest persons and search their private belongings without a warrant. But in a more vital sense, the peace of the community is preserved by decisions, such as *Chimel v. California, United States v. Chadwick,* and *Arkansas v. Sanders,* which protect all of us from unlawful arrests, searches and seizures.

Law enforcement entails the consideration of value far more important than the conviction of one defendant. It involves the protection of the community's rights to privacy which are of transcendent importance. The past judgments of this Court, which have preserved the right of privacy, serve the further protection against the most horrifying symbol of a police state—the arbitrary arrest, detention and search of citizens by policemen who have become masters rather than servants of the law.

We must never forget that unconstitutional practices begin by silent approaches and slight deviations from required legal procedures. Such an erosion of constitutional safeguards can only be avoided by strict adherence to the established rules of this Court that are designed to protect everyone's security. That is all we ask here.

For all the foregoing reasons, the judgment of the New York Court of Appeals should be affirmed.

Respectfully submitted,

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No. 80-328

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

—v.—

ROGER BELTON,

Respondent.

ON WRIT OF CERTIORARI TO
THE NEW YORK STATE COURT OF APPEALS

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION AND THE NEW YORK CIVIL LIBERTIES UNION, *AMICI CURIAE*

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INTEREST OF AMICI*

The American Civil Liberties Union is a nationwide, non-partisan organization of over 200,000 members, dedicated solely to defending the principles of freedom and democracy embodied in the Bill of Rights. The New York Civil Liberties Union is the New York State affiliate of the ACLU, having a membership of 20,000. It is similarly dedicated to defending our fundamental constitutional freedoms.

Central to those freedoms is the right to be free from unreasonable government search and seizure protected by the Fourth Amendment of the United States Constitution. That Amendment erects a critical barrier between the government and the citizen, and

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*Letters of consent to the filing of this brief from the parties have been lodged with the Clerk of the Court.

it defines the standards which the government must follow whenever it seeks to invade "the right of the people to be secure in their persons...and effects."

The ACLU and NYCLU have repeatedly urged upon this Court a "strict construction" of that Amendment. The New York Court of Appeals has commendably adhered to such a strict construction in this case, narrowly construing the search incident to arrest exception to the general Fourth Amendment rule that warrantless searches are per se unreasonable. New York and the United States, amicus curiae, on the other hand, urge the Court to abandon more than a half-century of settled law, and to cut the exception loose from the reasons which justify it. We file this brief to urge the Court to reject that invitation, and to protect the rights guaranteed by the Fourth Amendment.

SUMMARY OF ARGUMENT

The Fourth Amendment generally condemns as unreasonable warrantless searches, subject to a few "jealously and carefully drawn" exceptions. The extent of each exception is limited by the considerations which justify it. The warrantless search of the jacket in this case is sought to be justified as a search incident to arrest. However, neither of the two considerations which justify that exception - the security of arresting officers, and the need to prevent the destruction of evidence - applies where, as the highest court of New York has found here, an arrestee has neither access to nor control of the item to be searched. The arresting officer concededly perceived no danger, and declined even to draw his service revolver, admitting that he undertook the search of the jacket "to check for further contraband" (A-21). Moreover, since the defendant had neither

access to nor control of the jacket, there was no possibility that evidence which might be in it could be destroyed. Because neither of the considerations which justify the search incident to arrest exception to the warrant requirement apply here, the exception is unavailable, and evidence seized in the warrantless search must be suppressed.

STATEMENT

The facts and procedural posture of this case have been extensively and accurately described by the parties and the United States. Nevertheless, because certain details concerning the arrest are essential to disposition of the suppression issue under our view of this case, we will describe certain facts omitted in those factual recitations.

When the officer smelled marijuana in the vehicle he had stopped for speeding, he requested the car's occupants to exit the car. All four men promptly and without objection

got out of the two-door car (A-32), and the officer then frisked them and placed each around the car "so they would not be in physical touching area of each other...." (A-19). The officer "had no reason to," and did not, remove his service revolver (A-32). Subsequently, after the officer retrieved an envelope with traces of marijuana, he gathered the four arrestees together, read them their Miranda rights, and thoroughly searched them, including the contents of their pockets (A-21). At that point, the officer had smelled marijuana, found traces of marijuana in a manila envelope on the car floor, and retrieved marijuana cigarette butts from the car's ashtrays (A-38-41). [1] Also at that

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[1] Petitioner Belton and the three other arrestees pleaded guilty to a charge of unlawful possession of marijuana, and no question regarding the search of the envelope or the ashtrays is before the Court. See Petitioner's Brief at 7 n.3.

point, the vehicle's occupants had been formally placed under arrest while they were standing outside the vehicle (A-46-48).

The officer then re-entered the vehicle "to check for further contraband" (A-21), and saw a zippered leather jacket lying on the rear seat. He patted it down for weapons and did not feel any (A-42). He then unzipped one pocket and discovered evidence of cocaine. After the search of the jacket was completed, the officer took the jacket to his patrol car and kept it in official custody until the preliminary proceedings were completed (A-49-50).

On the basis of these facts, the New York Court of Appeals reversed the Appellate Division and trial court, which had both upheld the search of the jacket. The holding of the Court of Appeals is embodied in the first paragraph of the Chief Judge's majority opinion:

A warrantless search of the zippered pockets of an inaccessible jacket may not be upheld as a search incident to a lawful arrest where there is no longer any danger that the arrestee or a confederate might gain access to the article. (A-77).

ARGUMENT

A WARRANTLESS SEARCH FOR EVIDENTIARY ITEMS INCIDENT TO ARREST VIOLATES THE WARRANT CLAUSE OF THE FOURTH AMENDMENT IF THE OBJECT SEARCHED IS A PERSONAL ITEM NOT WITHIN THE ACCESS OR CONTROL OF THE ARRESTEE.

The Court has "jealously and carefully drawn" only a few, narrowly defined exceptions to the Warrant Clause of the Fourth Amendment, Jones v. United States, 357 U.S. 493, 499 (1958), and has limited those exceptions to the reasons which led to their creation. See, e.g., United States v. Robinson, 414 U.S. 218, 227-228; Warden v. Hayden, 387 U.S. 294, 310 (1967). The warrant requirement "is not an inconvenience to be somehow 'weighed' against the claims of

police efficiency". Search warrants are "or should be, an important working part of our machinery of government, operating to check the 'well-intentioned but mistakenly overzealous executive officers' who are part of any system of law enforcement." Arkansas v. Sanders, 442 U.S. 753, 758 (1979), quoting Coolidge v. New Hampshire, 403 U.S. 443, 481 (1971).

Sixty-seven years ago, in Weeks v. United States, 232 U.S. 383 (1914), the Court first referred to the now recognized warrant exception permitting warrantless search incident to arrest. The reasons which led to the creation of the search incident to arrest exception to the warrant requirement, and hence the policies that "mark...its proper extent", Chimel v. California, 395 U.S. 752, 762 (1969), are the safety of the arresting officers, and the need to prevent the destruction of evidence in "the area

within [an arrestee's] immediate control." Id. at 763;[2/] see also United States v. Chadwick, 433 U.S. 1, 15 (1977).

Since Weeks, the Court has carefully analyzed the facts of arrest and search cases with the single purpose of reconciling the privacy rights protected by the Warrant Clause with the twin practical exigencies inherent in arrest confrontations which led to the search incident to arrest exception. See Chimel v. California, supra. The Court

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[2/] The Court in Chimel defined the area "within...immediate control" to mean "the area from within which [an arrestee] might gain possession of a weapon or destructible evidence", thereby closely limiting the scope of the exception for warrantless searches to the twin justifications which gave rise to it. 395 U.S. at 763. Also, after exhaustive analysis, the Court overruled two cases which had permitted searches incident to arrest to extend "beyond the area from which the person arrested might obtain weapons or evidentiary items." 395 U.S. at 766. To the extent it meaningfully differs from the established Chimel test, which petitioner New York concedes applies in this case, the test sought by the

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has committed itself to detailed case-by-case analysis of (1) the time elapsed between the arrest and search, (2) the distance between the arrestee and the search, (3) the dominion and control arrestees may have retained over the articles searched, and (4) the privacy arrestees may have expected in the materials searched.

From these considerations, as analyzed in many differing factual circumstances, the Court has drawn a well-established set of requirements governing searches incident to arrest. In Chimel v. California, supra, and its progeny, United States v. Robinson, 414 U.S. 218 (1973); Gustafson v. Florida, 414 U.S. 260 (1973); Cupp v. Murphy, 412 U.S. 291 (1973); and Adams v. Williams, 407 U.S. 143 (1972),

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Solicitor General here is essentially the now rejected test applied in those overruled cases, Harris v. United States, 331 U.S. 145 (1947) and United States v. Rabinowitz, 339 U.S. 56 (1950).

the Court has settled the following basic rules: (1) Persons under arrest may be searched completely [3] both for weapons that could threaten arresting officers [4] and for evidence that could be hidden or destroyed.[5] (2) The area and objects immediately within the reach of an arrestee may be searched for the same reasons, so long as this search is undertaken contemporaneously with the arrest and there remains an actual threat that the arrestee's access to the area and objects within reach may provide him with a weapon or opportunity to hide or destroy evidence.[6]

3/United States v. Robinson, 414 U.S. at 234-235.

4/Id. at 234.

5/Id.; United States v. Chadwick, 433 U.S. at 15.

6/United States v. Chadwick, 433 U.S. at 15, ("Once law enforcement officers have reduced luggage or other personal property not immediately associated with the person of the arrestee to their exclusive control, and there

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In any other circumstances, even when an officer has seized an object suspected of containing contraband, the Fourth Amendment requires the officers to obtain search warrants before they invade the luggage, home, or any other possession of an arrestee. Chimel v. California, supra; United States v. Chadwick, supra. Unless the conditions giving rise to the search-incident-to-arrest exception are met, a search is per se invalid under the Fourth Amendment if no warrant is obtained, even though the search may be characterized other-

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is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer an incident of the arrest"); Chimel v. California, 395 U.S. at 762-768.

wise as wholly "reasonable" under the Fourth Amendment. United States v. Chadwick, supra; Mincey v. Arizona, 437 U.S. 385 (1978); United States v. United States District Court, 407 U.S. 297, 315-321 (1972).

These well-established rules, based on principles espoused since the turn of the century, are routinely implemented in state and federal courts. Although this type of search may be more common than any other, [7] there is relatively little doubt in the vast majority of cases whether a warrant should have been obtained, and the Court of Appeals decided the case 5-2 in accord with what it saw as well-settled Supreme Court precedent. Indeed, the United States rather forthrightly concedes that the case turns on whether the

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7/T. Taylor, Two Studies in Constitutional Interpretation, 48 (1969); American Law Institute, Model Code of Pre-Arraignment Procedure, 493-494 (1975), both cited in the Amicus Brief of the United States.

Court will continue to apply the established "exclusive control" test referred to in United States v. Chadwick, 433 U.S. at 15, and Arkansas v. Sanders, supra, 442 U.S. at 763 n.11, "or whether a different standard should govern." Brief for United States at 3.

The exact scope of the warrant exception in this case - a search of a jacket found on the back seat of an unoccupied car shortly after the formal arrest of four men - requires careful examination of the facts of this case, the justification which gave rise to the exception of searches incident to arrests from the warrant requirement, and other relevant Fourth Amendment doctrines.

We note, first, that this is not a search of a car and thus covered by the exception authorizing certain automobile searches. See, e.g., Arkansas v. Sanders, supra; Chadwick v. United States, supra. Moreover, evidence constituting probable

cause for arrest had already been obtained, and arrests made, when the officer pursued the search further by re-entering the car. Third, the search consisted of opening the zippered packets of a personal article of clothing in the back seat of an empty car, not frisking a person. Fourth, the initial outer search of the jacket eliminated the possibility that it contained a weapon. 8/ And sixth, there was no security threat perceived by the officer.

Of the undisputed facts, perhaps the most important is that the jacket was searched after the formal arrests while it

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8/ Although we note this factor under the circumstances of this case, we do not suggest that the officer was entitled to "frisk" the empty jacket then in his possession. Nonetheless, the fact that he did so and found no evidence of weapons wholly removes, we believe, any "security" justification for the opening and search of the pockets, even if the jacket had been within reach or control of the arrestees, as it was not.

was lying on the middle of the rear seat of a two-door vehicle (A-32). Apparently the officer climbed back into the vehicle to search while the arrestees stood waiting outside the car. 9/ The conclusion is inescapable, and the highest court of New York so found (A-77, A-81 n.2) that the jacket was out of the arrestees' reach, beyond "the area 'within [their] immediate control'" 10/ as defined by Chimel, and within the exclusive control of the officer at the time it was searched and seized. Compare United States v. Chadwick, supra, and

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9/The officer's decision to re-enter the two-door car to reach into the back seat when he had four arrestees scattered around the car, no partner to cover him, and a holstered weapon, confirms that he was not motivated by concern for his security. The maneuver if anything increased, rather than reduced, any risk he may have faced.

10/United States v. Chadwick, 433 U.S. at 14, quoting from Chimel v. California, 395 U.S. at 763; Arkansas v. Sanders, 442 U.S. at 763 n.11.

Arkansas v. Sanders, supra, (doctrine of search incident to arrest does not justify search of arrestee's possessions not within his immediate possession or control).

Several other considerations in this case suggest the inapplicability of the exception here. One important practical aspect of this case is that respondent's jacket was movable, not a fixture to which he had access such as a closet or chest of drawers. As the Court of Appeals found, once the arrestees left the automobile as instructed, the jacket was no longer within the arrestees' access or control, like the luggage in Arkansas v. Sanders or the footlocker in Chadwick. At that point, under the well-established "immediate control" test and the reasoning which created the Chimel exception, warrantless search was no longer justifiable. Moreover, once the officer had examined the jacket for

weapons, it was plainly not only not within the arrestees' access or control, but in fact within the exclusive control of the arresting officer. Certainly from that point the jacket no longer presented any threat to the officer or to the evidentiary integrity of the arrest. The officer even removed the jacket and secured it in his patrol car. 11/ Under Chimel and Chadwick, the officer was plainly required to obtain a warrant to search the contents of the seized item.

The undisputed facts of this case disclose that the search was undertaken not

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11/The policies behind the search incident to arrest exception - security and preservation of evidence - allow the police to move arrestees away from fixed objects that might conceal weapons or destructible evidence. Pennsylvania v. Mimms, 434 U.S. 106 (1977). Conversely, where, as here, the police can and do easily move transportable items so that they are not within the control of the arrestee, the narrow policies behind the exception do not justify a warrantless search. Arkansas v. Sanders, supra; United States v. Chadwick, supra.

for the security or integrity-of-evidence concerns which alone justify the exception, but rather as an evidentiary fishing trip after the arrest was complete. The officer conceded he was not looking for a weapon. (A-42). Rather, he was looking for more or other evidence, not evidence necessary to sustain the charges for which the car's occupants had been arrested. Had this been a search of the respondent while he was wearing his jacket, United States v. Robinson, supra, and Gustafson v. Florida, supra, would clearly have permitted an unrestricted search for weapons or evidence. But the arrest exception does not justify general warrantless searches of the possessions or home of an arrestee, as opposed to searches of the person or possessions within immediate reach. See Agnello v. United States, supra; Preston v. United States, 376 U.S. 364 (1964); Peters v. New York, 392 U.S. 40, 66 (1968); United

States v. Robinson, 414 U.S. at 234.

In privacy terms, there is no meaningful distinction between respondent's jacket with zippered pockets, and the suitcase and footlocker in Sanders and Chadwick. Although the jacket would be subject to a warrantless search if it had been worn, unworn it was a personal possession, the sealed pockets of which deserve at least as much privacy protection as luggage. Also, a jacket is even more easily removed to a secure area in a police vehicle than is a suitcase or footlocker, and thus presents far less inconvenience to the officer who follows the warrant procedure required by Chadwick and Sanders. 12/

12/After the Court in Chadwick rejected search incident to arrest as a basis for the government's warrantless intrusion in that case, the state did not even argue search incident to arrest in Sanders, though

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Reversal of the decision below on this record would promptly lead arresting officers to "rummage" personal possessions that are beyond the reach or control of the arrestee, Chimel v. California, 395 U.S. at 76, that are within the exclusive control of the officer, United States v. Chadwick, supra, and that could easily he removed by the officer for a subsequent search pursuant to a warrant, id. The distinction carefully

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the search of the trunk of the arrestee's taxi in Sanders took place contemporaneously with the arrest. The Court in Sanders noted that "[t]he State has not argued that respondent's suitcase was searched incident to his arrest, and it appears that the bag was not within his 'immediate control' at the time of the search." Arkansas v. Sanders, 442 U.S. at 763, n.11. This recent statement of the entrenched test of "immediate control" to distinguish between proper and improper warrantless arrest searches implicitly rejects the argument in the government's amicus brief. See also n.2 supra.

drawn in Robinson and other cases between searches of the "area within the control of the arrestee" and searches of areas not within the immediate control of the arrestee [13] would be eviscerated. If the Court were to abandon the "immediate control" rule and allow searches of private possessions already controlled by the arresting officer, as the United States urges, arresting officers could routinely seize luggage and other personal articles and otherwise invade the privacy of arrested persons.

We also note that affirmance of the judgment below, and the established rule relied on by the New York Court of Appeals, would not detract from the search for truth in criminal investigations. Law enforcement officers can always do what the Court

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13/ United States v. Robinson, 434 U.S. at 224.

required in Sanders and Chadwick - take the unsearched items with them and secure warrants for later search. There is no law enforcement justification, therefore, for jettisoning the Fourth Amendment's procedural safeguards in this case.

CONCLUSION

Because the search was undertaken of an easily movable item in which the respondent had a clear privacy interest, but which was no longer within his possession, reach, or control, and because the officer undertook the search not to protect either his security or the integrity of evidence, but solely for the purpose of discovering additional evidence, the decision of the New York Court of Appeals should be affirmed.

Respectfully submitted,

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Dated:
New York, New York

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No. 80-328

In the Supreme Court of the United States

OCTOBER TERM, 1980

THE PEOPLE OF THE STATE OF NEW YORK, PETITIONER

v.

ROGER BELTON

ON WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether a warrantless search of an item seized from an area within the potential reach of an arrestee, conducted during the course of the arrest process, is invalid because the item was within the control of the officer at the time of the search.

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THE PEOPLE OF THE STATE OF NEW YORK, PETITIONER

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ROGER BELTON

ON WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This case presents an important and frequently recurring question of Fourth Amendment law concerning the permissible scope of search incident to a lawful arrest. Although the particular facts of this case concern a search of a jacket inside an automobile following the arrest of a suspect outside the vehicle, the general question posed here arises in a great variety of situations. The issues presented by this case are of substantial interest to federal law enforcement officers and prosecutors. Several authorities

have noted that searches incident to arrest occur with far greater frequency than searches undertaken pursuant to search warrants.[1] The limits imposed by the Fourth Amendment upon searches of clothing or other items that might contain weapons, contraband, or evidence of crime, when such searches are undertaken in the course of the arrest process, are thus issues of central concern to the administration of criminal justice.

Federal or state officers arresting individuals on probable cause in circumstances analogous to this case often engage in contemporaneous searches of containers that are or were within the potential reach of the arrestee at the time of his arrest. A case in point is *United States* v. *Benson*, 631 F.2d 1336 (8th Cir. 1980), petition for cert. pending, No. 80-1317 (filed Feb. 4, 1981). There, in the course of arresting the defendant as he was seated in the front seat of an automobile, state officers seized from the seat, and immediately searched, a tote bag that the defendant had been reaching for at the time of arrest. The search uncovered a quantity of cocaine, which served as the basis for Benson's convictions on federal drug charges. On appeal, the United States Court of Appeals for the Eighth Circuit held that the cocaine should have been suppressed, concluding that "[o]nce the police officers seized the bag and exercised exclusive control over it" (631 F.2d at 1340) they should have obtained a warrant before conducting the search.[2] Whether the legality of searches such as

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[1] See T. Taylor, *Two Studies in Constitutional Interpretation* 48 (1969); American Law Institute, *A Model Code of Pre-Arraignment Procedure* 493-494 (1975).

[2] We have suggested that consideration of our petition in *Benson* be deferred pending the Court's decision in this case.

those in *Benson* and this case turns on the degree to which the object searched was within the "exclusive control" of the arresting officers, or whether a different standard should govern, is a matter of considerable importance to federal law enforcement activities.

STATEMENT

Following the denial of his motion to suppress evidence, respondent was convicted in the County Court of Ontario County, New York, upon his plea of guilty to attempted possession of a criminal substance—cocaine—in the sixth degree, in violation of N.Y. Penal Law §§ 220.05 (McKinney 1980) and 110.00 (McKinney 1975). He was sentenced to a term of from one and one-half to three years' imprisonment. On respondent's appeal,[3] the Appellate Division, Fourth Department, affirmed respondent's conviction (Pet. App. A-13 to A-18). The New York Court of Appeals reversed and ruled that respondent's motion to suppress should have been granted (Pet. App. A-1 to A-12).

1. The evidence at the suppression hearing showed that on April 9, 1978, a car in which respondent and three companions were riding was stopped for speeding by a New York State trooper (H. Tr. 6-9, 13).[4] The officer approached the car and asked the driver for his driver's license and automobile registration. As the driver produced the requested documents the

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[3] New York provides by statute for appeal by a defendant, following a plea of guilty, from the denial of a motion to suppress evidence claimed to be the fruit of an unlawful search and seizure. N.Y. Crim. Proc. Law §§ 710.20(1) (McKinney 1980) and 710.70(2) (McKinney 1971). See *Lefkowitz* v. *Newsome*, 420 U.S. 283, 285 (1975).

[4] "H. Tr." refers to the first volume of the suppression hearing transcript.

officer detected the odor of marijuana (H. Tr. 9, 12-13). After ordering the occupants out of the vehicle, the officer patted each of them down and directed them to stand at separate points in close proximity to the car (H. Tr. 13-15). The officer then retrieved from the floor of the car an envelope of a type commonly used to sell marijuana (H. Tr. 15-16). When he determined that the envelope contained marijuana, the officer formally placed the four individuals under arrest, searched their persons and searched the interior of the automobile (H. Tr. 17). The officer found a jacket on the rear seat of the vehicle; a search of the pockets of the jacket revealed a quantity of cocaine and an identification card bearing respondent's name (H. Tr. 17-19).

2. The Appellate Division upheld the search of the jacket as incident to respondent's arrest (Pet. App. A-13 to A-18). The court noted that under the Fourth Amendment the police, upon making a lawful arrest, may search the person of the arrestee and the area within the arrestee's control, including "those personal effects of the arrestee that are 'ready to hand' " (*id.* at A-17, quoting from *People* v. *Weintraub*, 35 N.Y.2d 351, 354, 320 N.E.2d 636, 638, 631 N.Y.S.2d 897, 900 (1974)). It concluded that once respondent was lawfully arrested for possession of marijuana, "the officer was justified in searching the immediate area for other contraband" (Pet. App. A-18).

The New York Court of Appeals reversed, two judges dissenting (Pet. App. A-1 to A-12). The majority observed that despite his arrest, respondent retained a legitimate expectation of privacy in the contents of his jacket pockets and that the arrest was not a license for the officer "to engage in a

warrantless search of unlimited temporal and geographic scope" (*id.* at A-8). While acknowledging that upon arrest a suspect's possessions within his immediate control may be promptly searched without a warrant, the majority concluded, in reliance upon language in this Court's opinions in *United States* v. *Chadwick*, 433 U.S. 1, 15 (1977), and *Arkansas* v. *Sanders*, 442 U.S. 753, 762 (1979), that once the suspect "is effectively neutralized or the object is within the exclusive control of the police," a warrantless search of the object may no longer be justified under the Fourth Amendment as incident to the arrest (Pet. App. A-7). In the majority's view, "[t]he critical inquiry focuses upon the extent to which the arrestee may gain access to the property rather than the time or space between the arrest and search" (*ibid.*). Because respondent was outside the automobile and under arrest at the time of the search, the majority held that his jacket was "within the exclusive custody and control of the police" and thus could not be searched without a warrant under a search incident to arrest rationale (*id.* at A-8).

The dissenters noted that the lower courts had found that "the jackets were within reach of the four suspects and had not yet been reduced to the exclusive control of the officer" (Pet. App. A-11). Pointing out that this case did not involve "an extended search of a defendant's property after the defendant has been completely subdued and all actual danger has passed" (*ibid.*), the dissenters took issue with the majority's conclusion that, because the suspects were outside the car and had been told that they were under arrest, both their persons and their property had been conclusively reduced to the exclusive control of the officer. "Although one might well wish that all

criminal suspects could so readily be subdued as a matter of law, I cannot agree with a decision that requires a police officer to stake his very life upon the validity of such a questionable presumption" (*id.* at A-12). Because "[t]he situation was still fluid," and because of the potential for danger or for destruction of evidence while the lone officer was in the process of arresting four unknown individuals, the dissenters concluded that the search was proper as incidental to the arrest (*id.* at A-11).

SUMMARY OF ARGUMENT

Under the holding of the New York Court of Appeals in this case, warrantless searches of bags, clothing, or other containers that might hold weapons or evidence of crime violate the Fourth Amendment whenever such containers, although searched during the course of the arrest process and although within the potential reach of the suspect at the time of arrest, are within the "exclusive control" of the searching officer at the time of the search. We believe that this holding represents a substantial and unjustified departure from the traditional understanding of the proper scope of a valid search incident to arrest and will inject undesirable uncertainty into the task of police officers in understanding and applying the search-incident exception. The standard for which we contend turns not upon a case-by-case determination of the degree of actual risk that the arrestee could, at the time of the search, gain access to the container. Rather, the lawfulness of a search sought to be justified as incident to an arrest depends upon whether the search was truly part of the arrest process or was an independent investigatory inquiry. The search is valid if it meets basic spatial

and temporal requirements: the former is satisfied if the item searched was physically located in a place to which the arrestee could potentially have gained access at the time of arrest; the latter is met if the search occurs during the period while the arrest is being consummated and before the situation has so stabilized that it could be said that the arrest was completed.

The "exclusive control" test applied by the court below is unsatisfactory for a number of reasons. At the outset, it must be noted that the test would rule out virtually all searches of bags, jackets, or other potential containers of weapons or evidence, that are portable and can be removed from the person or area of the arrestee. Unlike the arrestee's shirt or trouser pockets, such items are unlikely to be within the simultaneous custody of an officer and a suspect when searched. It will be practical to search them only when they are in the sole possession of the officer, and in most circumstances only when the arrestee has to a considerable extent been subdued. Once the officer has gained sufficient possession of the container and the situation has become sufficiently stable to permit a search, the container will probably be within the "exclusive control" of the police in the sense employed by the court below.

The "exclusive control" test is, in fact, inconsistent with the concept of search incident to arrest as traditionally understood and heretofore applied by this and other courts. For example, in *Draper* v. *United States*, 358 U.S. 307 (1959), having found that Draper had been lawfully arrested, the Court concluded that the ensuing search of the bag he had been carrying at the time of arrest was valid as incident to the arrest. And in *United States* v. *Rob-*

inson, 414 U.S. 218 (1973), the Court upheld the search of a cigarette pack taken from the arrestee's person on the same basis. In both cases it could be said that, by the time of the search, the item was in the "exclusive control" of the searching officer in the same sense as was respondent's jacket in the present case.

It is true that in both *Draper* and *Robinson* the item searched had been seized from the person of the arrestee rather than from a nearby area within his potential reach. But this does not afford a logical basis for distinction; in either situation the concerns about access to weapons or evidence have equal force, and in either situation the searching officer has the same degree of "exclusive control" by the time he undertakes his search.

Nor do the language or holdings of *United States* v. *Chadwick*, 433 U.S. 1 (1977), or *Arkansas* v. *Sanders*, 442 U.S. 753 (1979), justify the Court of Appeals' approach. The searches in those cases were considerably removed either spatially or temporally from the time and place of arrest and were plainly not part of the arrest process.

Finally, we note that the "exclusive control" test of the court below—which turns upon what will often be close and difficult judgments about the degree to which the particular complex of circumstances renders it improbable that the suspect could in fact gain access to the searched container—will be exceedingly difficult for police officers to apply and judges to administer. While there will always be some uncertainty at the margins in ascertaining whether the item searched was within the potential reach of the suspect at the time of arrest or whether the arrest process was still underway by the time of the search,

the Court should adhere to its position in *Robinson* eschewing intricate case-by-case analysis of the specific existence, in the circumstances of a particular case, of the dangers justifying the exception generally.

Applying the correct standard to the search in this case, it becomes evident that it was a proper search incident to arrest. The arrest, although announced by the officer, was still in the process of being completed at the time respondent's jacket was inspected, and the jacket was physically located within the potential reach of respondent at the time he was arrested. Nothing more need be shown to sustain the search.

ARGUMENT

THE FOURTH AMENDMENT PERMITS A POLICE OFFICER TO CONDUCT A WARRANTLESS SEARCH OF A CONTAINER THAT IS WITHIN THE POTENTIAL REACH OF A SUSPECT AT THE TIME OF A LAWFUL ARREST, SO LONG AS THE SEARCH IS SUBSTANTIALLY CONTEMPORANEOUS WITH THE ARREST

The holding of the New York Court of Appeals in this case related specifically to the search of an item of clothing located in the interior of an automobile. But the legal issue here presented—involving the proper scope of the historic exception to the requirement of either a search warrant or probable cause in the case of a search incident to a lawful arrest—extends beyond the particular circumstances of this case and implicates principles of general applicability to searches of many different types of "containers" into which an arrestee might reach to grab weapons or evidence of crime. In formulating the rules governing permissible police conduct in this area, there is

no principled basis for distinguishing between an article of clothing such as a jacket that is either carried or otherwise within reach of a suspect at the time of an arrest, and any other form of container the contents of which might be accessible to the suspect at any point in the course of the arrest process.[5] Accordingly, in treating the search incident to arrest issue presented here, our reference to the generic term "container" is meant to encompass a wide assortment of bags, packages and other similar articles, including clothing, which may be used to store or conceal weapons or evidentiary items.

A. A Search of a Container Seized From an Area Within the Potential Reach of an Arrestee Should Be Upheld as Incident to a Lawful Arrest if the Search is Undertaken as Part of the Arrest Process

The issue in this case is whether under the Fourth Amendment the police may, incident to a lawful arrest, conduct a contemporaneous search of a container that was within the potential reach of the arrestee at the time of arrest. While the validity of the search of a person incident to a lawful arrest "has been regarded as settled from its first enunciation" (*United States* v. *Robinson*, 414 U.S. 218, 224 (1973)), the search of an arrestee's surrounding area "has been subject to differing interpretations as to the extent of the area which may be searched" (*ibid.*). After a series of inconsistent holdings, the Court concluded in *Chimel* v. *California*, 395 U.S. 752 (1969), that a warrantless search incident to an

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[5] Clothing that is actually being worn by the arrestee may be subject to different rules, in part at least because it is not feasible to remove the arrestee's clothing until some time after the arrest process has been completed. See *United States* v. *Edwards*, 415 U.S. 800, 805 (1974).

arrest is reasonable only if it is confined to "the arrestee's person and the area 'within his immediate control'—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence." *Id.* at 763. The Court has also held that the search incident to arrest rationale does not apply to searches that are remote in time or place from the arrest. *Preston* v. *United States*, 376 U.S. 364, 367-368 (1964).

In reaching the conclusion that the search of respondent's jacket could not be justified as incident to his arrest, the majority below did not rely on a finding that the jacket was outside the potential reach of respondent and his companions, or that the search was removed in time or place from the arrest. Instead, the majority appears to have concluded that once respondent and his companions had been removed from the car and placed under arrest there was no longer any realistic danger that they would attempt to grab any weapons or evidence from containers inside the car (see Pet. App. A-8 to A-9).[6] In contrast, the dissenters stressed the dangers inherent in the confrontation between the lone arresting officer and four unknown suspects (*id.* at A-11 to A-12).

While there is much force to the dissenters' observations, in our view the permissibility of a search under the traditional search incident to arrest excep-

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[6] See also *United States* v. *Benson*, 631 F.2d 1336 (8th Cir. 1980), petition for cert. pending, No. 80-1317 (filed Feb. 4, 1981), where the court concluded that a prompt search of a tote bag for which the defendant was reaching at the time of his arrest could not be upheld as incident to the arrest because once the officer seized the bag "there was no longer any danger that [the defendant] might gain access to the bag to destroy evidence or grab a weapon." *Id.* at 1340.

tion does not turn upon a case-by-case assessment of the degree of actual risk that the arrestee could, at the time of the search, gain access to the container. Instead, the lawfulness of a search sought to be justified as incident to an arrest depends on whether, when viewed objectively (see *Scott* v. *United States*, 436 U.S. 128, 135-138 (1978); *United States* v. *Robinson*, *supra*, 414 U.S. at 236), the search can truly be said to have been undertaken as part of the arrest process rather than as a separate investigative inquiry after the arrest has been completed. In determining whether or not a search was part of the arrest process, the inquiry should focus on factors concerning the spatial and temporal proximity of the search to the arrest.

We submit that it is reasonable under the Fourth Amendment to permit the police, when a lawful arrest has occurred, to conduct a warrantless search of a container at the place of arrest if the search is substantially contemporaneous with the arrest and is confined to those containers within the arrestee's potential reach at the time of his arrest. See *United States* v. *Garcia*, 605 F.2d 349, 353 (7th Cir. 1979), cert. denied, 446 U.S. 984 (1980). The latter requirement, that the search be confined to containers to which the arrestee might again access at the time of his arrest, derives from the "immediate control" standard established in *Chimel* v. *California*, *supra*. The Court in *Chimel* explained the basis for this standard (395 U.S. at 762-763):

> When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable

> for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification, therefore, for a search of the arrestee's person and the area "within his immediate control"—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.

As the discussion in *Chimel* makes clear, searches of both the arrestee's person and of the area within his immediate control are justified by the same reasons, since the same danger exists that the suspect may reach for a weapon or destructible evidence concealed in the nearby area as for items on his person.

By confining the areas that may be searched to those within the potential reach of the suspect, *Chimel* establishes relatively clear outer limits beyond which the police may not engage in warrantless searches on the basis of a search incident to arrest rationale. Thus, the Court emphasized that the search incident to arrest exception provides no justification "for routinely searching any room other than that in which an arrest occurs—or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself. Such searches, in the absence of well-recognized exceptions, may be made only under the authority of a search warrant." 395 U.S. at 763 (footnote omitted). Under the *Chimel* rule, therefore, locked closets or other areas that technically may be within reach of the

arrestee but whose contents are inaccessible to him may not be searched—absent a warrant, consent, or exigent circumstances.

The requirement that the search be "substantially contemporaneous" with the arrest is one that has been expressed in numerous decisions of this Court. See, *e.g.*, *Vale* v. *Louisiana*, 399 U.S. 30, 33 (1970); *Shipley* v. *California*, 395 U.S. 818, 819 (1969); *James* v. *Louisiana*, 382 U.S. 36, 37 (1965); *Stoner* v. *California*, 376 U.S. 483, 486 (1964); *Preston* v. *United States*, *supra*, 376 U.S. at 367; *Agnello* v. *United States*, 269 U.S. 20, 30 (1925). This requirement is satisfied if the search occurs during the period in which the arrest is being consummated and before the situation has so stabilized that it could be said that the arrest was completed. For example, after the arrestee has been placed in a patrol car and driven away from the scene of the arrest, a search of a container seized from the arrestee would not qualify as incident to the arrest even if the container had been within the arrestee's potential reach at the time of arrest. While the precise boundaries of the "substantially contemporaneous" standard remain to be fleshed out, this requirement places law enforcement officers on notice that a search of a container within reach of the arrestee must be undertaken promptly in the course of completing the arrest in order to be justified as incident to arrest.

In light of these principles, it follows that contemporaneous searches of unlocked containers within the "immediate control" of an arrestee are permissible under the search incident to arrest doctrine. Containers such as gym bags, briefcases, or the pockets of a jacket certainly are places into which an arrestee might have placed weapons or evidence upon the ap-

proach of police officers and might reach to seize a weapon and conceal or destroy evidence.

The "immediate control" and "substantially contemporaneous" requirements are readily understandable and should afford law enforcement officers a sufficient basis to make an on-the-scene assessment whether a particular container may be searched as an incident of an arrest. Adherence by the police to these requirements will ensure that searches incident to arrest will be undertaken only as part of the arrest process itself, rather than as an entirely separate investigatory undertaking.

B. The "Exclusive Control" Test Applied by the New York Court of Appeals is an Unsatisfactory Standard for Determining the Applicability of the Search Incident Exception to a Search That is Conducted as Part of the Arrest Process

Although the court below did not expressly question the validity of the search incident to arrest doctrine, its holding raises serious questions concerning the continuing applicability of that doctrine to searches of bags, clothing, and other types of containers at the time and place of arrest, even where the container is within the potential reach of the suspect at the moment of arrest. In the view of the Court of Appeals, law enforcement officers may not undertake a search of a container incident to a lawful arrest once they have gained "exclusive control" (Pet. App. A-7) over the container. If the court below is correct, few, if any, searches of containers could be justified as incident to arrest. Unless the police make a point of holding the container in question within reach of the suspect as they open it, the container will almost always be under the "exclusive

control" of the police, in the sense the concept seems to have been employed here, at the time of the search. Thus, the decision below, if upheld, would severely limit, if not effectively abolish, the search incident to arrest exception with respect to searches of movable items that are capable of being reduced to exclusive police custody.

The "exclusive control" test, as employed by the court below, is fundamentally inconsistent with traditional principles governing searches incident to a lawful arrest as reflected in the decisions of this Court. For example, in *United States* v. *Robinson, supra,* a District of Columbia police officer stopped an automobile, ordered the occupants out of the car and arrested the driver for operating a motor vehicle after the revocation of his operator's permit. In the course of searching the defendant's person incident to his arrest the officer removed a crumpled package of cigarettes from the defendant's coat pocket. The officer discovered that it contained heroin capsules. Rejecting the conclusion of the dissenting Justices that once the officer took possession of the package it was no longer possible for the defendant to gain access to a weapon and that therefore the search of the package could not be upheld as incident to the arrest (414 U.S. at 255-259), the Court upheld the inspection of the package as part of a valid search incident to a lawful arrest. *Id.* at 236. See also *Gustafson* v. *Florida,* 414 U.S. 260, 266 (1973) (search of cigarette box upheld as incident to arrest); *Adams* v. *Williams,* 407 U.S. 143, 149 (1972) (automobile search upheld as incident to arrest). Similarly, in *Draper* v. *United States,* 358 U.S. 307 (1959), after finding that Draper had been lawfully arrested on probable cause, the Court upheld, as incident to the

arrest, the search of a zipper bag that Draper had been carrying at the time of arrest.

Although *Robinson* and *Draper* involved the search of a container seized from the person of the arrestee, the Court's conclusion in both cases that the officer could search the container after taking possession of it applies with equal force to contemporaneous searches of containers that are within the potential reach of a suspect at the time of arrest. There is no rational ground for differentiating between searches of cigarette packages, purses, or similar items seized from the person of the arrestee and like containers seized from the arrestee's immediate vicinity. Thus, for purposes of the search incident to arrest doctrine, it is of no constitutional significance whether at the moment of arrest the person is actually carrying a jacket or bag or has set it down next to him on a bench or on the seat of a car.[7] In either case, as *Chimel* teaches, the concerns about access to weapons or evidence during the arrest process are of equal magnitude. And in either situation, regardless of the container's original location, once the officer undertakes his search, the container presumably is within his "exclusive control" and is no longer accessible to the arrestee.

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[7] Most lower courts have upheld contemporaneous searches of such containers whether or not they were in the physical possession of the suspect at the time of arrest. See, *e.g.*, *United States* v. *Graham*, No. 80-1206 (7th Cir. Jan. 27, 1981); *United States* v. *Garcia*, *supra*; *United States* v. *Dixon*, 558 F.2d 919 (9th Cir. 1977), cert. denied, 434 U.S. 1063 (1978); *Dawson* v. *State*, 40 Md. App. 640, 395 A.2d 160 (1978); *State* v. *Brasel*, 538 S.W.2d 325 (Mo. 1976); *State* v. *LaBlanc*, 347 A.2d 590 (Me. 1975); *State* v. *Bracco*, 15 Or. App. 672, 517 P.2d 335 (1973).

This Court's decisions in *United States* v. *Chadwick*, 433 U.S. 1 (1977), and *Arkansas* v. *Sanders*, 442 U.S. 753 (1979), did not adopt the position, rejected in *Robinson*, that contemporaneous searches of containers seized from the person or the immediate area of the arrestee may not be undertaken as incident to a lawful arrest. Although the Court in both cases stated that a warrant was required once the police gain "exclusive control" over luggage,[8] neither case presented the question whether a prompt search of a container within the immediate control of an arrestee at the time of arrest could be upheld under the traditional search incident to arrest exception. Thus, the statements in both cases are dicta insofar as they may be construed (contrary to their apparent intent) as applying to traditional searches incident to arrest.

The search in *Chadwick* was remote both in time and place from the arrest, and hence could not, under settled principles (see *Preston* v. *United States*, *supra*), have been upheld as incident to arrest.[9] Furthermore, *Chadwick* reaffirmed the principle es-

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[8] In *Chadwick*, the Court observed that "[o]nce law enforcement officers have reduced luggage or other personal property not immediately associated with the person of the arrestee to their exclusive control, and there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer an incident of the arrest." 433 U.S. at 15 (footnote omitted). In *Sanders*, the Court noted that a warrant was required to search a suitcase where "the officers had seized the luggage and had it exclusively within their control at the time of the search." 442 U.S. at 762.

[9] Indeed, the government did not argue in *Chadwick* that the warrantless search of the footlocker at the federal building approximately 90 minutes after the defendants' arrest was

tablished in *Robinson* that a traditional search incident to arrest may be conducted "whether or not there is probable cause to believe that the person arrested may have a weapon or is about to destroy evidence. The potential dangers lurking in all custodial arrests make warrantless searches of items within the 'immediate control' area reasonable without requiring the arresting officer to calculate the probability that weapons or destructible evidence may be involved." 433 U.S. at 14-15.

In *Sanders*, the Court expressly declined to consider whether the search at issue could be justified as incident to the arrest, noting that the State had not made that argument and that it appeared that the suitcase, which was in the trunk of a taxi in which the defendant had been riding, was in any event not within his "immediate control." 442 U.S. at 764 n.11. *Sanders* demonstrates quite convincingly that the Court's reference to "exclusive control" in *Chadwick* did not mean to foreclose prompt searches of containers incident to arrest. If *Chadwick* had in fact ruled out such searches, it would have been unnecessary for the Court in *Sanders* to explain why it was not addressing the search incident theory; instead, the

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permissible as a traditional search incident to arrest. Instead, the government urged that "the Constitution permits the warrantless search of any property in the possession of a person arrested in public, so long as there is probable cause to believe that the property contains contraband or evidence of crime." 433 U.S. at 14. See Brief for the United States (No. 75-1721, 1976 Term) at 49-57. Moreover, the container in *Chadwick* was a double-locked footlocker that was not readily accessible at the time of arrest and that accordingly would not likely have been subject to a search incident to arrest even if the search had been undertaken contemporaneously with the arrest.

Court simply could have stated that any such argument did not survive *Chadwick*.

Nor did *Chadwick* and *Sanders* establish that certain containers may never be searched incident to arrest because of an arrestee's heightened privacy interest in their contents. The decision below appears to rest in part on the premise that the arrest of respondent did not vitiate his privacy interest in the contents of his jacket pockets (see Pet. App. A-8). But the fact that an arrestee may ordinarily have a legitimate expectation of privacy in the contents of containers within his possession and control at the time of arrest is irrelevant in determining the validity of a search incident to a lawful arrest.[10] While a purse or the pockets of a jacket are "respositor[ies] of personal effects" (*United States* v. *Chadwick*, *supra*, 433 U.S. at 13; *Arkansas* v. *Sanders*, *supra*, 442 U.S. at 762), that fact does not make it less likely that a weapon or evidence of crime may be concealed inside. In *Chimel*, the Court concluded that when an arrest takes place inside private premises, it is permissible for the police to search "a drawer in front of one who is arrested." 395 U.S. at 763. An arrested suspect unquestionably has at least as legitimate an expectation of privacy in the contents of drawers inside his home as he has in the contents of containers he carries outside the house. Indeed, even the majority below recognized that "[u]pon

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[10] A somewhat different question is presented as to the propriety of warrantless searches of certain types of containers, such as paper bags or plastic trash bags, that by their nature may enjoy reduced privacy protections. Quite apart from any arrest, warrantless searches of such containers may be lawful if supported by probable cause. Such an issue is before this Court in *Robbins* v. *California*, cert. granted, No. 80-148 (Jan. 19, 1981).

arrest, the privacy interest of the arrestee in possessions within the arrestee's immediate control [is] subsumed within the State's interest in discovering weapons, thwarting access to means of escape and preventing the destruction of evidence * * *" (Pet. App. A-7). Thus, as a general matter, searches of containers may be undertaken as incident to a lawful arrest regardless of the fact that the arrestee otherwise enjoys a privacy interest in their contents.

To be sure, as the Court observed in *Chadwick*, if the search of a container is " 'remote in time or place from the arrest' " (433 U.S. at 15, quoting from *Preston* v. *United States*, *supra*, 376 U.S. at 367), it cannot be justified as incident to that arrest.[11] Thus, we agree that after the arrest process has been completed, privacy considerations again become relevant and in such a situation the police may not, absent a warrant, conduct an investigative search of a container in which the arrestee has a legitimate expectation of privacy unless the arrestee consents to the search or exigent circumstances are present.

We submit that when applied to searches contemporaneous with an arrest, the "exclusive control" test of the court below is an impractical standard that will be difficult for the courts to administer and the police to observe, because what constitutes "exclusive control" may vary depending upon subtle differences in the factual situation of each particular case. This Court in *Robinson* expressly rejected the "suggestion that

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[11] A routine inventory of the contents of an automobile may be taken at a time and place removed from the arrest. *South Dakota* v. *Opperman*, 428 U.S. 364 (1976). This may also be true of clothing, bags, or other containers seized from a suspect at the time of his arrest. See *United States* v. *Chadwick*, *supra*, 433 U.S. at 21 (Blackmun, J., dissenting). This issue, however, is not presented here.

there must be litigated in each case the issue of whether or not there was present one of the reasons supporting the authority for a search of the person incident to a lawful arrest." 414 U.S. at 235. As the Court explained (*ibid.*):

> A police officer's determination as to how and where to search the person of a suspect whom he has arrested is necessarily a quick *ad hoc* judgment which the Fourth Amendment does not require to be broken down in each instance into an analysis of each step in the search. The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect. A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification. It is the fact of the lawful arrest which establishes the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a "reasonable" search under that Amendment.

Because it is the fact of custodial arrest that gives rise to the authority to search, the Court in *Robinson* concluded that searches incident to arrest are permissible without regard to whether the arresting officer had a subjective fear that he was in danger when making the arrest. 414 U.S. at 236.

In light of this Court's analysis in *Robinson*, we submit that the permissibility of a search of a container at the time and place of arrest should not turn on whether the police have "exclusive custody" of the container or have "neutralized" or subdued the suspect at the time of the search. Whether a container is within the "exclusive control" of the police or whether the suspect has been sufficiently "neutralized" will often require a careful weighing of the minute factual shadings of each case. For example, if, as in this case, an arrestee is outside a vehicle in which a container is located, is the container within the "exclusive control" of the officer, and is the arrestee sufficiently "neutralized" so as to bar a search of the container incident to arrest? If one officer is in the process of searching the person of the arrestee while another officer is searching a container, is the latter search impermissible without a warrant? See *United States* v. *Benson*, *supra*. If the container and the arrestee are moved for legitimate reasons a short distance away from the spot at which the arrest has taken place, can a prompt search of the container be undertaken? See *United States* v. *Garcia*, *supra*. If the police have handcuffed the suspect but have not yet removed him from the vicinity of the container, is the possibility that the arrestee might still reach into the container for a weapon or evidence so remote that a search of the container will not be upheld as incident to the arrest? See *United States* v. *Neumann*, 585 F.2d 355, 359-360 (8th Cir. 1978); *United States* v. *Jones*, 475 F.2d 723, 727-728 (5th Cir.), cert. denied, 414 U.S. 841 (1973); *United States* v. *Ciotti*, 469 F.2d 1204, 1206-1207 (3d Cir. 1972), vacated on other grounds, 414 U.S. 1151 (1974).

As these examples illustrate, resolution of the permissibility of a search under the "exclusive control"

and "neutralization" standards employed by the court below may turn on hairline distinctions between the circumstances of different cases. These standards provide little or no practical guidance to the officers on the scene as to what they may or may not do. Moreover, these impractical standards are not compelled by the policies that the Fourth Amendment is meant to serve. The touchstone of the Fourth Amendment is reasonableness. Because the fact of a lawful arrest provides the authority to search a suspect as well as the area within his "immediate control," a properly limited search of a nearby container incident to arrest is "reasonable" under the Fourth Amendment. See *United States* v. *Robinson*, *supra*, 414 U.S. at 235.

The need for clear rules in this area is manifest. To begin with, "[a] search incident to arrest is by far the most common variety of police search practice, and it occurs under an infinite variety of circumstances." LaFave, *"Case-By-Case Adjudication" Versus "Standardized Procedures": The Robinson Dilemma*, 1974 Sup. Ct. Rev. 127, 143 (footnote omitted). Moreover, the decision whether, in a particular arrest situation, it is necessary to search a nearby container is a difficult one that would require the officer to speculate about the likelihood that the arrestee might have evidence or a weapon concealed inside the container and the possibility that the arrestee might attempt to reach into the container to grab such items. In contrast to the decision whether to procure a warrant to search a dwelling, where there is ordinarily an opportunity for the officers to marshal and weigh the appropriate facts, the difficult decision to search a container within reach of an arrestee must be made by the officer on the scene

in the midst of a dangerous, fast-moving, unpredictable situation. Finally, the authority to search incident to arrest is not unrestrained, but rather is limited to the period immediately before and after the arrest and to containers within reach of a person whom the police have probable cause to believe has committed a crime.[12] In these circumstances, "[a] highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions, may be the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed, but they may be 'literally impossible of application by the officer in the field.'" LaFave, *supra*, 1974 Sup. Ct. Rev. at 141 (footnote omitted), quoting from *United States* v. *Robinson*, 471 F.2d 1082, 1122 (D.C. Cir. 1972) (Wilkey, J., dissenting), rev'd, 414 U.S. 218 (1973). See *United States* v. *Chadwick*, *supra*, 433 U.S. at 22 n.3 (Blackmun, J., dissenting).[13]

This is not to say that the facts of a particular case are irrelevant in determining whether a search may be justified as incident to a lawful arrest. But it is our submission that the protections the Fourth Amendment affords to people "can only be realized if the police are acting under a set of rules which, in

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[12] A properly limited search may be upheld as incident to arrest even if it precedes the formal arrest, so long as the arrest immediately follows the search and the police had probable cause to arrest at the time of the search. *Rawlings* v. *Kentucky*, No. 79-5146 (June 25, 1980), slip op. 12.

[13] Cf. *Dunaway* v. *New York*, 442 U.S. 200, 213-214 (1979) (footnote omitted): "A single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront."

most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement." LaFave, *supra*, 1974 Sup. Ct. Rev. at 142. See also E. Griswold, *Search and Seizure—A Dilemma of the Supreme Court* 47-49 (1975); Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 375 (1974). In order to ensure that the police will be capable of both understanding the rules and applying them in practice, we submit that it is important to limit to a minimum the variables that must be weighed in assessing the lawfulness of police actions in this area. Thus, we believe that it should be irrelevant whether, as in this case, there is one arresting officer and four suspects or four arresting officers and one suspect (see *United States* v. *Benson*, *supra*). Nor should such factors as the place where the arrest occurs (*e.g.*, inside a house, at an airport, outside an automobile), the nature of the container (*e.g.*, briefcase, purse, jacket pocket), and whether or not the suspect was holding or reaching for the container at the moment of arrest ordinarily make a difference in the constitutional analysis. The only realistic standard in this context is the one that we have articulated above, which focuses on whether or not the search was undertaken as part of the arrest process.

Applying the correct standard to the facts of this case, it is clear that the search of respondent's jacket was substantially contemporaneous to the arrests of respondent and the other occupants of the car. Furthermore, at the time of their arrests, respondent and his companions were "in close proximity" to the vehicle (H. Tr. 15). The Appellate Division accordingly concluded (Pet. App. A-18) that respondent's jacket

was within the "immediate area" of the arrestees at the time of arrest. In holding that the search could not be justified as incident to arrest the Court of Appeals specifically refused to consider what we submit are the critical factors of "the time or space between the arrest and search" (*id.* at A-7), but rather based its decision on the ground that, because respondent and the other suspects were formally under arrest outside the car, the jacket was in the "exclusive control" of the officer at the time of the search (*id.* at A-8). As we have shown, however, the "exclusive control" test is an inadequate standard for determining the propriety of a search of a container incident to arrest. The court below therefore erred in relying on that standard to suppress the fruits of the search.

CONCLUSION

The judgment of the New York Court of Appeals should be reversed.

Respectfully submitted.

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